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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,	:	08-CR-640
	:	
v.	:	U.S. Courthouse
	:	Brooklyn, New York
ROBERT SIMELS	:	
ARIENNE IRVING	:	August 11, 2009
Defendants.	:	9:30 o'clock a.m.

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TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE JOHN GLEESON
UNITED STATES DISTRICT JUDGE, and a jury.

APPEARANCES:

For the Government:	BENTON J. CAMPBELL United States Attorney
	BY: STEVEN L. D'ALESSANDRO MORRIS FODEMAN DANIEL BROWNELL Assistant U.S. Attorneys
For the Defendants:	GERALD SHARGEL, ESQ. EVAN L. LIPTON, ESQ. For Robert Simels
	JAVIER A. SOLANO, ESQ. LAWRENCE BERG, ESQ. For Arienne Irving
Court Reporter:	Gene Rudolph 225 Cadman Plaza East Brooklyn, New York 11201 (718) 613-2538

Proceedings recorded by mechanical stenography, transcript
produced by CAT.

1 (The following occurred in the absence of the jury.)

2 THE COURT: Good morning.

3 Please be seated.

4 MR. D'ALESSANDRO: Good morning, Your Honor.

5 THE COURT: Good morning.

6 MR. FODEMAN: Good morning, Judge.

7 MR. D'ALESSANDRO: I just need --

8 THE COURT: You are advancing on me like something
9 is going to happen.

10 MR. D'ALESSANDRO: Before the jury came out I just
11 wanted to put something on the record. I already advised
12 Mr. Shargel and Mr. Solano.

13 This morning when I was on my way to the courtroom,
14 one of the jurors got on the elevator, asked me if it was
15 going up or down. I didn't answer. He realized who I was. I
16 tried to get off the elevator and he said no, no. It's okay.
17 I just got off the elevator. We took separate elevators up.

18 And then on my way into the courtroom, he was ahead
19 of me, turned around and said sorry. I didn't speak to him.

20 I think we just have very polite jurors.

21 MR. SHARGEL: Which number?

22 MR. D'ALESSANDRO: One of the alternates. I think
23 it's alternate number two.

24 MR. FODEMAN: Judge --

25 THE COURT: One second, before I forget. I reworked

1 the charge a little bit, to accommodate the fact that with
2 regard to Count Two, the government is relying only on
3 corruptly persuade. I had described the elements of the
4 subsequent counts by reference to Count Two. But they need to
5 be tinkered with. So the subsequent counts incorporate by
6 reference Count Three instead, which involves intimidation and
7 the other threats.

8 Also, as you know, because I circulated another
9 draft yesterday, the request that I inspired at the charge
10 conference, which was removed, I have denied. That's related
11 to the Counts 12 and 13.

12 MR. SHARGEL: Your Honor, what about -- I didn't see
13 yesterday's version. What about the second request in the
14 letter over the weekend which was --

15 THE COURT: I moved that falsus in uno thing so it
16 is not right next to the defendant's testimony charge.

17 MR. SHARGEL: Very well.

18 Thank you.

19 MR. FODEMAN: Judge, I have worked desperately over
20 night to trim down my rebuttal. I had originally asked for an
21 hour. I am going to, if it's all right with the Court, try to
22 squeeze it into forty-five minutes. Is that all right?

23 THE COURT: I think that's fair. I had said half an
24 hour. Then Mr. Shargel went -- everybody went longer than
25 they anticipated.

Rebuttal summation - Fodeman

1873

1 MR. FODEMAN: Thank you, Judge.

2 THE COURT: I don't think that's inappropriate given
3 the length of the defense summations.

4 All right.

5 MR. SHARGEL: Ready to go.

6 THE COURT: Bring in the jury, please, Ilene.

7 MR. BROWNELL: Thank you.

8 (Jury present.)

9 THE COURT: Good morning, everybody.

10 Nice to see you.

11 Have a seat.

12 All right. Mr. Fodeman, are you ready with your
13 rebuttal summation?

14 MR. FODEMAN: Yes, Your Honor.

15 Thank you.

16 THE COURT: Go ahead.

17 MR. FODEMAN: Good morning, everyone.

18 This right here, this is the record. These good
19 people here, they have been taking down every word that has
20 been said during the course of this trial.

21 Those binders, that's all the exhibits that were
22 introduced in evidence in this case.

23 That's the record in this case. So before I begin,
24 I just want to set the record straight about a few things that
25 counsel said yesterday.

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Rebuttal summation - Fodeman

1874

1 What am I talking about? Do you remember that
2 timeline that Mr. Shargel put on the video monitor yesterday
3 towards the end of his summation? He was trying to prove the
4 point that look, May 13th, Selwyn Vaughn comes into the first
5 meeting and then weeks go by and his client has no interest in
6 Selwyn Vaughn, doesn't care about him, not interested, had
7 nothing to do with him. He says it wasn't until two weeks
8 later there is finally a voice message from Selwyn Vaughn to
9 the defendant.

10 Not true, not the record in this case. Government
11 Exhibit 202, an email. Who is from? Robert Simels. What's
12 the date? May 19th. Thanks for writing.

13 May 16th, just three days after the meeting. Thank
14 you for meeting with us. We are awaiting your note for Roger.

15 Does this sound like people who aren't interested in
16 dealing with Selwyn Vaughn?

17 How about May 10th? Before the next meeting?
18 Contact us, that's the -- that's the subject. Contact us.

19 These defendants want to talk to Selwyn Vaughn
20 because he offered them help in their case.

21 The Dancing Man letter, I call it, Government
22 Exhibit 810. You remember that letter. Mr. Shargel started
23 his whole summation with this letter. You remember it. My
24 brother Paul. Here it is.

25 He started off by telling you, there is no evidence.

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Rebuttal summation - Fodeman

1875

1 We -- who is Paul?

2 Ladies and gentlemen, you have heard enough evidence
3 to know who Paul is.

4 Unsigned.

5 Ladies and gentlemen, take five minutes. Read this
6 letter. If you don't think it was written by Roger Khan, then
7 you weren't at this trial.

8 May 13th, he tells you, what does this have to do
9 with the trial? Selwyn Vaughn didn't start dealing with them
10 until 2008? This says 2007.

11 The conspiracy, it is charged starting in 2006.

12 Then he tells you, his main point, that there is no
13 evidence that this was ever sent from the law office of
14 Robert M. Simels.

15 Well, he is right. He is right in the sense that we
16 don't have a two-year-old email sending it down to Guyana.
17 But there is evidence in the case to suggest that's exactly
18 what happened with respect to that letter.

19 You have seen it in this case, what they do with
20 letters that they take out of the jail for their client. You
21 saw it. Right here, on June 17th.

22 By the way, whose handwriting is that? Roger
23 Khan's?

24 What's the attachment? It's a letter from their
25 client. Who is it being sent to? It is an email being sent

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1 to Selwyn Vaughn. That's what they do with these letters that
2 they take out of the jail. They send them to where their
3 clients want them sent.

4 I mean, imagine for a second that their client
5 spends hours and hours and hours writing that letter to his
6 brother Paul, his friend in Guyana. Pages and pages and
7 pages. They take it out of the jail. They scan it into their
8 computer. And then just leave it there. Do you think that's
9 what happened? Is that what really happened? They just leave
10 it there?

11 Client says yes, I wasted four hours writing a
12 letter and you never sent it?

13 Mr. Shargel, he's not the only culprit here. Let me
14 talk to you about some of the things Mr. Solano said about the
15 record.

16 How is Arienne Irving supposed to know that Selwyn
17 Vaughn is a criminal? The government -- this is -- I am
18 paraphrasing. The government says that nothing was said
19 during the initial meeting, the May 13th meeting, about Selwyn
20 Vaughn being a drug dealer. The government points to Selwyn
21 Vaughn talking about his cousin, Marvin. Do you remember
22 this? It talks about Marvin. He says, the government wants
23 you to believe because they raised this topic about Marvin
24 working for Mr. Khan, that they had to know.

25 But then he shows you this, the part in blue. He

Rebuttal summation - Fodeman

1877

1 tells you, look, look, ladies and gentlemen, only says, all
2 was said my cousin was working for him. I was dealing with
3 the boss.

4 How is she supposed to know they weren't talking
5 about working in the timber business?

6 Well, how about the page before? Turns out that
7 what was said about Marvin Vaughn, in the defendant's
8 presence, was, he got locked up, in Surinam. He was involved
9 in a drive-by. It wasn't just a drive-by. It was related to
10 a drug case, a drug deal gone bad.

11 Then what happened? Roger Khan ordered him to come
12 home. He didn't listen. That's why he's in jail.

13 Mr. Solano wanted you to focus on this part, the
14 blue. He didn't want to you turn the page back and read the
15 yellow.

16 He told you, the government is misrepresenting
17 things. They are not telling you that Ms. Irving wasn't at
18 these meetings. They didn't ask the questions. I had to ask
19 the questions. Don't believe anything the government says.

20 Really? Is that what happened in the case?

21 Page 336 of the transcript. Mr. D'Alessandro, the
22 government lawyer.

23 Was Ms. Arienne Irving at every one of those
24 meetings?

25 No, sir.

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Rebuttal summation - Fodeman

1878

1 When she was there, was she present during the
2 entire meeting?

3 She was in and out of the ^ plural rooms.

4 Page 435, was she there for the entire meeting, line
5 nine?

6 No, sir.

7 Was Mr. Vaughn asked about whether Ms. Irving was
8 there or not? Of course he was.

9 Then this I think is the greatest. Mr. Solano was
10 explaining to you that during that discussion in the initial
11 meeting, he was trying to say that his client was doing
12 everything right and Vaughn was the liar. You remember there
13 was some discussion about having Vaughn go into the jail and
14 speak to Khan. He would have to fill out a form to be able to
15 get in there.

16 Mr. Solano made a point of it. Vaughn says, hey, I
17 could just say I'm a family member. Why don't I just say I am
18 a family member and I can get in?

19 And then he showed you the form Ms. Irving filled
20 out. It's not really a family member. She told the truth.
21 She wrote friend.

22 Well, is that exactly what happened? Is that really
23 exactly what happened?

24 Take a look at the transcript on this issue about
25 what to say on the form.

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Rebuttal summation - Fodeman

1879

1 First, they are talking about, we have to get him on
2 the witness list.

3 Well, they have -- only certain people and you have
4 to be related. He's only allowed one.

5 Then Vaughn says -- this is the part that Mr. Solano
6 wanted you to focus on. Well, I could be a relative, Vaughn
7 says. My father is Indian.

8 Irving, I think he's only allowed one friend.

9 If Mr. Solano had his way you would read this and
10 say Vaughn is a liar, trying to trick these guys and
11 Ms. Irving. She is not a bad actor at all.

12 How about when they are actually filling out the
13 form, the next page, page 41. Remember Vaughn raised visitor.
14 He is filling out the form. Alien number. Visa, visa number.

15 Vaughn asks, relationship to above named? What do I
16 put? Friend, family? Relative?

17 What does Ms. Irving say? Leave that blank.

18 Why? Why leave it blank? She knows that Vaughn is
19 not related to Khan. Why is she even thinking about lying on
20 the form?

21 When she called the jail and she finds out the
22 friend slot is taken, we are going to write in relative? Is
23 that what she is thinking about?

24 I could go on about things that were
25 mischaracterized and not accurate about the record. I am not

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1 going to do that. I've got a limited amount of time.

2 Because I have a limited amount of time, I want to
3 sort of narrow your focus, focus on what the issue is and what
4 the issue is not in this case.

5 This case is not about surge protectors. It's not
6 about paying for parking. It's not about CLE classes. As
7 judge told you yesterday, it's not about sending messages.
8 It's not about where the defendant's photos were displayed
9 during the course of the trial, I submit to you. That's not
10 what this case is about.

11 It is also not about all the legitimate work that
12 these defendants did on behalf of Roger Khan. They worked
13 hard for him. We told you that from the beginning. No one is
14 disputing that. They did things that lawyers are supposed to
15 do. No doubt about it. They represented him for years.

16 There was nothing wrong with going out and hiring a
17 team of licensed investigators. Not a thing wrong with it.

18 There was nothing wrong with following up leads,
19 interviewing their client, talking to witnesses; nothing wrong
20 with that.

21 There is nothing wrong with trying to find dirt on
22 people, so you can discredit them. That's the system. That's
23 what you are supposed to be doing.

24 You want to go out and find evidence that someone is
25 a bigamist, as was suggested in this case, go for it. That's

1 what you are supposed to be doing.

2 But what you are not supposed to be doing, as a
3 lawyer, or anyone for that matter, what you are not supposed
4 to be doing, is paying witnesses, threatening people, talking
5 about hurting people, and not directing other people to do the
6 same. You can't do that. You can't do it if you are a lawyer
7 and you can't do it if you are a civilian, a regular person,
8 not a lawyer.

9 It's not good enough to play by the rules 99 percent
10 of the time; not good enough.

11 They bring up Nigel Rodney, remember this talk
12 yesterday by Mr. Shargel? Nigel Rodney, he's an experiment.
13 He's a cooperator. And they didn't tamper with him, great,
14 great (clapping hands together.) Found a witness you didn't
15 tamper with. Fantastic. Really great. Doesn't matter that
16 Mr. Rodney, unlike Mr. Clarke, was willing to sit down and
17 talk seven different times so there would be no need to tamper
18 with him.

19 It's like the bank robber who says, okay, you got
20 me. I robbed a Citibank, but I didn't rob the Chase, or the
21 murderer who comes in and says, all right, I murdered him but
22 I didn't murder all these people.

23 Come on, ladies and gentlemen. It doesn't matter
24 that they thought their client was innocent, if you believe
25 that. It doesn't matter. Just because you think your client

1 is innocent doesn't give you the right to toss away the rule
2 book. It doesn't give you that right.

3 It doesn't matter if you thought the government
4 witnesses were going to lie about your client. You are going
5 to hear a little -- you have heard a little bit about this
6 truth telling defense. Sure, no one is saying that you can't
7 try to convince people to tell the truth. But you can't do it
8 illegally. You can't threaten people to do it. You can't put
9 a gun to someone's head, obviously, and say you go tell the
10 truth. You cannot do that.

11 You can't send out Selwyn Vaughn like a loaded
12 weapon to get at these witnesses, to use their words.

13 Just because you are a defense counsel does not
14 permit you to play the role of judge and jury. You don't get
15 to make the decisions. A jury does.

16 You don't get to buy the testimony you need. You
17 don't get to threaten people and you don't get to do violence
18 against them to keep them off the stand.

19 These defendants had a lot invested in this case, no
20 doubt about it. Both had spent lots and lots of time. And in
21 Mr. Simels's case, he had spent lots and lots of money. But
22 that doesn't give them the right to tamper with witnesses.

23 They spent 3800 hours on the case. No one is
24 doubting a minute of it. But you can't spend one hour,
25 one minute, one second, doing what these defendants did.

1 This case is not about what the defendants did
2 right. They did do things right. It's about what they did
3 wrong.

4 I mentioned the truth telling defense. Again, just
5 briefly, yes, no one is saying that lawyers can't do their
6 job. No one is saying they can't meet people and convince
7 them the error of their ways and try to convince them to tell
8 the truth. Of course, that's their job.

9 But is that what you think Robert Simels was doing
10 when he said well, I don't really care if it's the truth or
11 not. I don't give a damn.

12 Or when he gives Selwyn Vaughn the memo from his
13 client and says, he wants you to testify to all this shit.

14 Do you think he's seeking the truth there?

15 But even if you think he is, you can't go
16 threatening people. You can't go harming people. You can't
17 go buying people.

18 As reluctant as Robert Simels was to tell you, you
19 can't bribe people to tell the truth.

20 Another thing that's not an issue in this case, and
21 Mr. Shargel spent a lot of time on it, was what Mr. Mazzella
22 should have, could have, or what Mr. Shargel would have done.

23 I kept thinking about those six words. Could have,
24 should have, would have.

25 First he tells you that law enforcement techniques

Rebuttal summation - Fodeman

1884

1 are not your concern. And the judge is going to tell you that
2 in probably about half hour.

3 Then he goes on to talk about what? Law enforcement
4 techniques.

5 He says, he suggests to you, that there was no
6 reason why did -- why did Investigator Mazzella send Selwyn
7 Vaughn into the office in the first place? What was the
8 evidence to suggest there was any wrong doing? Dirty up the
9 government.

10 Well, he got some lady -- you got a -- you got a
11 corrections officer at the GO telling you that Mr. Simels
12 tried to lie his way into a jail.

13 Then you have a cooperating witness who says, I was
14 in Roger Khan's gang. I helped him find people who were dead.
15 Now those gang members are telling me to go see his lawyer and
16 I can't think of a good reason for it. What do you want me to
17 do?

18 Maybe, if Mr. Shargel had his way, Mr. Mazzella
19 would sit at his desk, feet up, eating donuts, doing nothing.
20 Don't respond. Do nothing. In response to those road signs,
21 do nothing.

22 But instead what does he do? He sends Selwyn Vaughn
23 in and asks what do you want.

24 Look, I submit to you, if these defendants didn't
25 start coaching Selwyn Vaughn in the very first meeting, we

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1 wouldn't be here.

2 Shouldn't have sent Selwyn Vaughn in. Shouldn't
3 have told him to pursue this bribe angle. This is like Monday
4 morning quarterbacking. Shouldn't have told him to do that.
5 What should he have done? Killed people instead? That's the
6 other alternative being talked about. Would it have made for
7 a really spectacular case if law enforcement had gone out and
8 killed Allison. Wouldn't have been much consolation to
9 Allison? Is that what they would have had us do?

10 Come on. It's preposterous. It's ridiculous.

11 What's the implication, that Robert Simels would
12 only bribe this witness, only started talking about bribing
13 witnesses because Selwyn Vaughn suggested it? It's the
14 government's suggestion? Is that the implication?

15 His defense is, I wasn't going to bribe anyone. I
16 was never going to bribe anyone. So what's the point of that?

17 The point, ladies and gentlemen, is to take the
18 focus off the defendants and put it on the government. But
19 here is a news flash. Guess what? The government is not on
20 trial here. Those two people are. They're on trial.

21 So when Mr. Shargel thinks, and he can't stop
22 thinking about this since the case happened, he says, we
23 should have sent an undercover in. We would have gotten
24 exquisite evidence of guilt if Mr. Simels was really guilty.
25 We should have had someone play the role of Leslie Camacho and

Rebuttal summation - Fodeman

1886

1 then we'd all know and it would be so much easier for the jury
2 to know. It sounded pretty good. Mr. Mazzella, why didn't we
3 do that.

4 Think about it. What would be the exquisite
5 evidence? The undercover would go in. How she is supposed to
6 know every single thing about Leslyn Camacho's life and David
7 Clarke's life, to be able to answer this defendant's
8 questions, who seems to know everything about everyone I don't
9 know, but assuming she can pull it off, what's the tape going
10 to sound like?

11 I am Leslyn Camacho. I am here for a bribe.

12 Robert Simels, great. Here is the money.

13 And then where would we be? We'd be right here with
14 the defendant saying I was going to sting her. We'd be right
15 in the exact same spot.

16 It wouldn't prove one thing more than what we have
17 now. But even if you thought it would be great, even if you
18 think it would be fantastic evidence, it doesn't mean the
19 defendant is not guilty with the evidence that has been
20 presented to you, the overwhelming evidence, the crystal clear
21 tapes that prove these defendants guilty.

22 Now I will talk to you a little bit about the
23 meaning of words. Mr. Shargel said in his opening statement,
24 that words -- I want to get this right. Words in the tape,
25 meaning the wire -- the tape that Vaughn was making -- don't

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1 convey meaning or intent.

2 What? They don't send the true meaning of what he's
3 saying? Is that -- that sounds like lawyer talk to me. Let's
4 break it down. Let's see how this played out.

5 Ladies and gentlemen, we have heard every excuse in
6 the book for those words during the course of the last
7 two-and-a-half weeks. I got a list here. Let me read it to
8 you because I couldn't possibly remember.

9 High school talk.

10 Locker room talk.

11 Trash talk.

12 Loose talk.

13 Unfortunate talk.

14 Just talk.

15 This one I had to look up last night, skullduggery.

16 Just keeping the conversation going.

17 Please, listen to the tapes. Is that what's going
18 on here?

19 I was focusing on my computer.

20 We were having a blackout.

21 I didn't mean what I said.

22 I was turned around.

23 I was twisted around.

24 I was looking over here.

25 I was talking street.

Rebuttal summation - Fodeman

1888

1 I was trying to talk down to Vaughn. He's from a
2 third world country and I needed to talk to my audience.

3 How about this excuse? The government is over
4 analyzing the tapes.

5 Okay. I didn't mean what I said.

6 It's legalese.

7 It's lawyer talk.

8 It's legal vernacular.

9 It's a CLE class title.

10 And my favorite, this is the absolute best, I said
11 those things but I was lying when I said them.

12 I said I wanted Selwyn Vaughn to be my witness, over
13 and over and over again, but I was lying. I was never going
14 to call him.

15 I said bring in Leslyn Camacho so I can bribe her.
16 But I was lying. I was never, ever going to pay a bribe. I
17 was going to sting her.

18 I was waiting for the excuse of aliens took over my
19 body and started making my mouth talk.

20 Ladies and gentlemen, when you are caught on tape
21 and you cannot deny what was said, you have to deny what was
22 meant.

23 I submit to you, ladies and gentlemen, that these
24 tapes when you listen to them, are the best reflection of what
25 these defendants meant. Listen to them.

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1 You might have noticed during the course of this
2 trial there was a different approach, shall I say, with the
3 presentation of evidence. Nothing wrong with what was done.
4 I am not saying there was anything wrong. You might have
5 picked up on the idea that it seems like the government's
6 playing the tapes, actually playing the evidence for you, and
7 then the defense isn't. We are looking at cold transcripts.
8 We are putting our own spin on the way the words were said.
9 The amount of time that elapsed between sentences, to -- if it
10 helps.

11 Listen to the tapes. Listen to the tapes.

12 The defense, I submit, didn't want you to listen to
13 the tapes during their presentation. During Mr. Simels's
14 cross, was there any tape playing? During their summation,
15 did you hear any tapes? They didn't want you to hear those
16 tapes because it is devastating evidence of their intent,
17 devastating. They just wanted you to rely on these cold
18 transcripts.

19 Now, I can't possibly go over all those excuses.
20 Impossible. But let me just talk about a few here.

21 May 13th, you have seen this before. Is this a
22 mistake, is this just lawyer talk here when he's telling him
23 not to describe him as a boss?

24 This is page 36. Go look back and see how many
25 times Selwyn Vaughn had said he is the boss. But now we get

1 to page 36, we certainly don't want to describe him as the
2 boss.

3 Was that what? Lawyer vernacular? Lawyeresque?
4 Aliens? What?

5 But, of course, that isn't the worst of it.
6 Neutralize Clarke. Who says neutralize Clarke? Robert Simels
7 says neutralize Clarke. He is talking about driving fear in
8 him and he says I agree with you, I agree with you.

9 Let me get something straight with everyone right
10 from the start. Yes, lawyers say things like neutralize.
11 Agreed, lawyers say things like I am going to kill that guy on
12 cross. True.

13 Is that what was going on here? Honestly, honestly,
14 when Mr. Simels was talking to Selwyn Vaughn, was that what he
15 was saying to put it in context? Put it in context.

16 How about this? Is there any excuse, any
17 explanation, on the planet, for this line? This is June 20th
18 when the thousand dollars comes out.

19 With George, he said you can deal with George the
20 way you think he needs to be dealt with in terms of finding
21 out where he is in this thing. I don't think they'll put
22 the -- the heat on him that screwing around with the mother
23 would.

24 What's screwing around with the mother? We are just
25 talking about killing the mother. I mean, doing something

1 violent to her.

2 This is not lawyer lexicon, ladies and gentlemen.
3 This is an instruction to a man to go out, find this person
4 and do what you have to do to keep them off the stand. If it
5 means hurting them, fine. If it means threatening them, fine.
6 It's sending a -- it's like sending a loaded weapon and aiming
7 them right at the witnesses.

8 This isn't street talk. It's not -- it's not trash
9 talk. It's not locker room talk.

10 By the way, while we are on the topic of the
11 thousand dollars that was paid at that very moment, ever
12 wonder why, if all this is legitimate, if, as Mr. Solano says,
13 this was just an investigator, as far as we knew, why isn't
14 the thousand dollars cash in the billing records? Take a look
15 at those billing records. Pour through them if you want.
16 They are in evidence. This thousand dollars is not there.

17 Payments to other legitimate investigators, it's in
18 there. 3500, I don't know the exact numbers. 3500 to Deb
19 Martin, sure. It's in there. Paid by check.

20 You remember Deb Martin, this was a funny part of
21 the trial. I asked Deb Martin, did -- did he pay you in check
22 or in cash? She laughed. She thought it was an absurd
23 question.

24 It is. Because he's not an investigator. He's a
25 tool, at their disposal, to win this case.

1 Sometimes, ladies and gentlemen, actions speak
2 louder than words.

3 One other thing I just want to talk about quickly
4 and it is so preposterous. Remember this?

5 I wasn't paying attention. It was a blackout. He
6 says this thing about driving fear into their hearts, in one
7 ear, out the other. I wasn't paying attention. Like three
8 days later it dawned on me that this guy is crazy. He's
9 talking about hurting people. I got to do something about it.

10 That was his testimony.

11 So what do I do about it? I send out email,
12 Government Exhibit 208, and this -- the defense, I submit,
13 couldn't show you this enough. It's about Roger. It says
14 simply be careful in your efforts to gather information and
15 not do anything that can be misconstrued by anyone. These are
16 difficult times and people will draw the most unfavorable
17 inference. Be cautious. Have authorization for gathering
18 materials.

19 Where is the don't kill anyone? Don't hurt anyone?
20 Don't threaten anyone?

21 When does it end with, have authorization for
22 payment for gathering material?

23 I thought he was being sent out to look for
24 witnesses. Right? What materials are we talking about?

25 Okay. So maybe it's not the most artfully drafted

1 email in the world. Maybe it could have been stronger. But
2 you think the guy is a lunatic? He's crazy, a liar, off the
3 reservation, right? So what do you talk about? This is
4 June 13th, two days after the June 11th meeting when he's
5 going off the reservation. What do you talk to him about the
6 next meeting? Do you say hey, Selwyn, relax. You can't go
7 crazy. This is America. You can't hurt people. You can't
8 harm people. Can't buy people.

9 What are we talking about in the next meeting? I
10 don't think he'd mind if you did violence to Allison. Really
11 talked him off the ledge with that one.

12 Robert Simels took that stand. He took an oath. He
13 told you, among other things, I was never going to call
14 Fineman. He was never going to call him. Yes, I talked to
15 him about testifying. Not once, not twice, not three times,
16 not four times, not five times, but at every single meeting
17 that we had, I talked to him about that issue. Every single
18 one. But I didn't mean it. I was lying.

19 Take a look. These are all the times that he talked
20 about calling Selwyn Vaughn as a witness.

21 Yes, I was coaching him. I was telling him to say
22 things that weren't true. But you can't suborn perjury for
23 someone you are not going to call.

24 What are you going to say when you are caught
25 suborning perjury? It's like the guy who is caught with a gun

Rebuttal summation - Fodeman

1894

1 in his pocket by the police and he says, oh, officer, great, I
2 am glad you stopped me. I was just bringing this down to the
3 precinct.

4 What are you going to say?

5 He's got -- invested 3800 hours in the case. He's
6 got a trial coming up. He thinks the guy is a liar and a
7 lunatic. He's going to waste time prepping this guy who's
8 never going to testify? What does he tell you? I wanted to
9 flatter him. Illegal alien, wanted to flatter him. Come down
10 to federal court and be a witness.

11 Two words I have to say you should think about when
12 considering whether Selwyn Vaughn was not going to testify.

13 Says who?

14 Says who?

15 Says Robert Simels?

16 Don't get distracted by this whole Rule 15 motion
17 that they put on the screen yesterday. That motion is asking
18 the Judge: Judge, these people aren't coming to the United
19 States. They won't be at the trial. We need to video them in
20 Guyana.

21 Guess what? It's not a witness list. It's not who
22 we are going to call at the trial. It's who do we need to
23 videotape in advance of trial because they are not in America.
24 They can't get into America. They don't have visas or they
25 are unwilling to come.

GR

OCR

CM

CRR

CSR

1 I'm sorry. Is Selwyn Vaughn in Guyana or is he in
2 the United States?

3 They want you to believe well, obviously I wasn't
4 going to call this guy. He is not on the Rule 15 motion.

5 Why would he be?

6 Sometimes you can say things, but that doesn't make
7 it true.

8 How about this, ladies and gentlemen? He says, it's
9 a sting. Again, says who? Robert Simels?

10 Let me tell you why it's not a sting.

11 This is why it's not a sting. Remember what he is
12 saying. Yes, you caught me on tape trying to bribe this lady,
13 talking to Selwyn Vaughn, bribe her, bring her in saying false
14 things. It was all a lie. It was a ruse. It was a sting. I
15 was going to bring her in, tape her, run to the government and
16 look at your lying witnesses. That was the plan from the
17 get-go, he told you, right from the start, when it was first
18 raised in July. That was the plan.

19 Really? Really? If that's the plan, why would you
20 not tell Fineman? Think about that for one second. If it's
21 really a plan, why not tell him? Look, get this girl in and
22 we are going to do just that. Otherwise, what's going to
23 happen? Number one, he is going to promise her \$10,000. She
24 is going to show up and she won't get jack. Right?

25 (Continued on next page.)

Fodeman Summation

1896

1 MR. FODEMAN: He's dealing with her and reporting
2 back conversations she's saying. Why not give him the
3 recorder? You send a recorder down to Shoo Loo from Guyana to
4 record people saying bad things. Look, she may never come
5 into my office, but at least let's get her on tape with Selwyn
6 Vaughn.

7 Was that ever done? The reason why he didn't have
8 Selwyn Vaughn -- he didn't give Selwyn Vaughn the money, as
9 Mr. Shargel suggested he ought to. It was really a bribe. He
10 didn't want Selwyn Vaughn running off. He didn't trust some
11 people he never met. I am going to give five grand, and I'm
12 not going to hear from anyone.

13 He didn't want to lose it. That's why he didn't
14 give Fineman the money.

15 If it's a sting, why is he telling the witnesses
16 through Fineman it's just a legal witness fee? You're trying
17 to get the woman in to do something illegal, but you're
18 telling her that it's completely legal.

19 Maybe some of you thought it was okay. Maybe Leslyn
20 Camacho thinks when a lawyer tells her, You can pay someone
21 ten thousand or five thousand to testify for someone, that is
22 okay. You would want to tell her the exact opposite. It's a
23 bribe; right?

24 I'm not even going to show you on T-26, T-28. I
25 have limited time. That's why I'm not showing you it. Tell

1 her it's a witness fee. Put it in her head it's fine. When I
2 get her to come in and collect it, I'll run to the government
3 and I'll say, Look at this crime, and I won't tell the
4 government I told her there's nothing wrong with it. If it's
5 a sting, why play hardball about the money? You want her to
6 come in and get caught on tape; right? You're never going to
7 pay her any money; right? Why play hardball? Get her numbers
8 down. Tell her it's too expensive. It's too much. What if
9 she walks away? There goes your sting. You're out of luck.

10 How come no investigator? We heard about a team of
11 licensed investigators. Who was the investigator on September
12 10? Could have been an eyewitness to this bribe. Where was
13 he? How about Deb Martin being there? Not there. She would
14 have been a eyewitness to this bribe.

15 Why not call law enforcement in advance, like their
16 own expert said he did. He walked out of that jail. What did
17 he tell you his first call was? His first call was to the
18 U.S. Attorney's Office. It's not like you're running to the
19 prosecutor who is on your case. You can run to a different
20 prosecutor and keep up a firewall. Why not do that? That
21 way, no one can come around later and say, Hey, you were
22 bribing her. At least this way, you've covered yourself.

23 He doesn't do that. He says, I didn't have the
24 evidence, I didn't have the evidence yet? Her telling you
25 that she want to be bribed is evidence, that's evidence. At

1 minimum, you would want a document that you're about to do a
2 sting. You would want to cover yourself.

3 In all those documents, in those computers, if this
4 was a sting, don't you think there would be a shred, one iota
5 of evidence that this was going to be a sting? Something, a
6 memo, all these detailed memos where it was discussed that
7 this was going to be a sting. The defendant don't have any
8 burden do produce anything. Don't you think there would be
9 some evidence to support this claim?

10 Finally -- I don't know that's finally, I'm getting
11 close to "Finally" -- \$2500 in the drawer. Is that just dumb
12 luck? He tells you this was not to pay Leslyn Camacho. It
13 happens to be exactly half of \$5,000. Coincidence? Maybe.
14 You may have noticed in his opening statement, Mr. Shargel
15 didn't even mention this 2500. He said all that there was
16 there was \$40. You might have thought that he was not going
17 to bribe her until this came out.

18 While we're on the topic, don't you think there
19 would be some evidence? We have these detailed billing
20 records. He tells you, I got that money from another client.
21 Where is the proof of that? Again, no burden to do anything.
22 You think if this came from some other source, not Khan, we
23 would be hearing about it?

24 And what's right next to that? Khan money. The
25 blue Post-It note.

1 And, finally, the September 5 memo. This is the
2 memo that says September 5, five days. The sting plan has
3 been in the works for over almost two months by now, and they
4 write -- I should say Ms. Irving writes in a memo directed to
5 Mr. Simels, Roger wants to know if we can tape the meeting.
6 They say, This is great. This proves that we were going to
7 tape the meeting. It's right here.

8 No, it doesn't. It proves the opposite. This was
9 in place for two months; right? The whole plan, the whole
10 plan, according to Mr. Simels, was to get her in and tape her,
11 this meeting with their client every single week, oftentimes
12 more. They are talking about Leslyn Camacho and her meeting.

13 The fundamental point of the whole sting is to catch
14 her on tape. Why, just five days before, does Roger Khan say,
15 We should tape it? That was the whole thing, tape it.
16 Because he knows that the whole reason that they are bringing
17 her in is to bribe her, not to sting her. He wants to get her
18 on tape, so just like he has the affidavit, he'll have more
19 leverage on her down the road.

20 And if that was not all enough, we have the bug from
21 the jail. If that was not enough to prove the defendant's
22 claim that he was not trying to do a sting, then nothing is.

23 The defendant talked about the power of suggestion.
24 You listen to the tape. You listen to them with the
25 transcript, you listen to it without. You listen for the

Fodeman Summation

1900

1 word "Leslyn," and see if the word "Leslyn" isn't in there.

2 And what about linking this to Fineman? What about
3 that line? How come there's nothing on the tape about the
4 sting that's coming up?

5 And why in the world, if these -- if this is really
6 going to be a sting and those Title III -- I'm sorry -- those
7 recordings at the jail are really about -- remember what they
8 were saying? She has to lower the amount. I wrote her a
9 stinging letter. He's talking about the prosecutor, according
10 to Mr. Shargel. If that's really not about lowering the
11 amount of the bribe, why, on the very, very next day, the very
12 next day, he said exactly what they are talking about? So, I
13 have to get the numbers down. Is that just a coincidence, a
14 horrific coincidence for Mr. Simels?

15 Please.

16 Let me talk to you a little bit about Ms. Irving.
17 The gist of her defense is, I didn't know what was going on.
18 I wasn't around for most of the meetings, that ^ I was either
19 on jury duty or in Europe. Or, I was text-messaging to
20 Guyana. I was walking around the office. I didn't know what
21 was going on. Yes, I did a lot of work on the Khan case, and
22 I discussed it all with the client, and what I did was all
23 legitimate. The rest, I was doing what I was told,
24 mindlessly. I thought Fineman was just an investigator.

25 First of all, before we go any further, did you ask

Fodeman Summation

1901

1 yourself there, If nothing was wrong with what was going on in
2 those meetings, nothing was wrong with it, as counsel would
3 suggest, why is Mr. Solano so eager to establish his client
4 wasn't at them? Right? How many footsteps did we hear?
5 Right? If nothing's wrong with what's going on, then why do
6 you have to not be there? I'll put that aside.

7 She can't possibly think that Selwyn Vaughn is just
8 an investigator. Just another Deb Martin. Really? Really?
9 Do you have conversations like this with your client about Deb
10 Martin? Don't do anything stupid in terms of the Clarke's
11 mother. Hey, Deb Martin, don't do anything stupid.

12 This memo proves that she was the one who was
13 talking to the client about the plans with Selwyn Vaughn,
14 Clarke's mother, and these other witnesses. She's the one
15 reporting back. She's the conduit. She's the one who conveys
16 the information both ways, to Robert Simels from Robert
17 Simels, to Roger Khan from Roger Khan. That's her role.

18 No one's saying that she came up with this plan. No
19 one is saying she would have even done it if she worked for
20 another lawyer. No one says she's the mastermind. No one is
21 saying if she didn't work there, it wouldn't have happened,
22 anyway. Rather than stop what she saw, she joined in. She
23 made a choice. She made a decision. It's her decision.

24 Decisions have consequences. She's an attorney.
25 Talk about five minutes as an attorney. She knows better.

Fodeman Summation

1902

1 When she's witnessing people being coached, you can't stand
2 silent, even if you think you're going to lose your job.
3 Tough choice to make, I grant you that. She was in the uneasy
4 spot, but her choice to make. Lots of people commit crimes
5 because of who they are associated with. You don't get to
6 say, Well, I was just running around with the wrong crowd, so
7 it's not my fault. You making choices in life. You have to
8 live with them.

9 And this, Mr. Solano didn't address at all. RK says
10 he wants to wait until the judge rules on the 404(b) motion
11 before writing down what Fineman should say. He doesn't
12 address it, because there's no explanation for it. It's
13 coaching a witness.

14 By the way, Fineman is not really testifying. Why
15 is she writing that? It's not the quantity. She's not being
16 charged with obstructing justice for an hour. That's not the
17 charge. She's not being charged with being in a meeting where
18 obstruction of justice happened. She's being charged with
19 helping to obstruct, an attempt to obstruct justice and
20 conspiring to obstruct justice.

21 It's not the quantity of the time she's on the tape,
22 it's the quality. It's the time she's in the jail where we
23 don't have recordings, the time when she's going back and
24 forth reporting this information.

25 She says she doesn't know what's going on. I just

Fodeman Summation

1903

1 was mailing tapes. Listen to the conversation before she's
2 told, Mail the tapes. Tell them to go grab these guys. Do
3 you believe she would say that to Deb Martin, really? Really?
4 Mr. Solano said this was a nightmare for her. I'm sure it is.
5 You might have sympathy for her. You may. The judge will
6 tell you you can't decide the case on sympathy. You decide it
7 on the evidence.

8 THE COURT: How much more do you have?

9 MR. FODEMAN: Five minutes, your Honor.

10 THE COURT: Okay. Wrap it up.

11 MR. FODEMAN: Just a word on the wiretaps, and then
12 I'm winding up.

13 Here is the defense: The government made me do it.
14 They told me to do it. Okay. If they didn't tell me to do
15 it, I didn't know what I had. All right. If I knew what I
16 had, it didn't work. If I knew all that, I only brought in
17 half at a time, and he brought the other half. And finally,
18 It was in my boss's office. The government made me do it.

19 It sounds terrible. Obviously, if that's what
20 happened here, they cannot be convicted 100 percent if they
21 were tricked into bringing the stuff here to comply with the
22 discovery. Agreed, not guilty. That's not the evidence.
23 That's not evidence in the case.

24 We showed you all these letters back and forth. As
25 if there's a discovery request. Please show us the equipment,

Fodeman Summation

1904

1 and then he's trying to comply. I can't do it now, because I
2 don't have the time.

3 Look at these letters. 308-C 308-C. And look at
4 the last one. It's from the government. And what does it
5 say? "Furthermore" -- this is August 14, had the equipment
6 now for two months -- "Furthermore, you have ignored our
7 requests to have our computer expert inspect the original
8 recordings. The recordings, not the equipment, the original
9 recordings is what's being asked for.

10 They ignored it. They are not trying to comply.
11 You can say things, but it doesn't make it so.

12 How about that, I didn't know what I had? I'm not
13 going to talk about it. You know they knew exactly what they
14 had. Besides, it seems a little inconsistent. I was bringing
15 the stuff here because it was wiretap equipment and I made
16 these tapes, but I didn't know it was wiretap equipment.
17 Fine. It didn't work. Total red herring. Listen to the
18 judges's instruction on this.

19 This is the blackberry; right? Designed to send
20 e-mails, make calls; right? Take the battery out, right, what
21 is it designed to do? Still designed to send e-mails and make
22 phone calls. The issue is design, not operability. If they
23 were charged with possessing operational equipment that could
24 actually do stuff, not guilty. That's not the crime. If they
25 turn off a service, still designed. You bring it to Europe,

Fodeman Summation

1905

1 doesn't work, still designed. That's the issue. I only
2 brought in half, and it was not in my office. I don't know
3 what to say about that.

4 Ladies and gentlemen of the jury, these defendants
5 would have you believe that they are victims, they are the
6 victims of a manipulative Selwyn Vaughn. They confounded
7 them, to use their word. They are victims of the client who
8 didn't pay his own. They are the victims of Ms. Waite's, from
9 the GEO, lies. They are victims of the government, who
10 tricked them to bringing in this wiretap equipment. They are
11 the victims of the government, who can't come up with clear
12 tapes. They can launch a shuttle, but they can't come up with
13 clear tapes. They are the victims of the overzealous
14 investigators. They are the victims of over-analyzing
15 government lawyers.

16 They are the victims of their own ill-chosen words.
17 Make no mistake, ladies and gentlemen of the jury, these two
18 people before you, they are not victims. They seek to blame
19 everyone but themselves, but they don't want to look in the
20 mirror. They are here because they made choices, and they
21 decided they had to win at all costs.

22 Mr. Shargel said Robert Simels was the kind of
23 lawyer that his client would appreciate. I'm sure his client
24 appreciated the efforts that these defendants made. I'm not
25 sure you would appreciate it if you happen to have the

Fodeman Summation

1906

1 misfortune of being a witness in a case against Mr. Simels or
2 Ms. Irving.

3 These defendants ignored their oaths as lawyers, and
4 rather than just defend criminals, which is what they should
5 be doing, they decided to become criminals. They forgot the
6 obvious basic, fundamental principle is to not commit crimes.
7 Lawyers cannot commits crimes.

8 Now, ladies and gentlemen, now, for two and a half
9 weeks, it's time for these defendants to be held accountable
10 for their actions, for the breach of the trust that was
11 afforded to them as attorneys, and hold them responsible for
12 their choices, not because Mr. Brownell and Mr. D'Alessandro
13 or Mr. Mazzella or me say so, but because the evidence says
14 so.

15 Thank you, ladies and gentlemen of the jury.

16 THE COURT: Thank you, Mr. Fodeman.

17 Can I see counsel at sidebar?

18 (Sidebar.)

19 THE COURT: The reference to the wiretap, the
20 suppressed wiretap tape in the summation, in this rebuttal,
21 reminded me that when it came in, the only instruction I gave
22 was the one you requested, which relates to the audibility.

23 MR. SHARGEL: I didn't want the impeachment
24 instruction, if that's where you're going.

25 THE COURT: That's my question.

Fodeman Summation

1907

1 MR. SHARGEL: I have another point.

2 Judge, I appreciate your remarks about waiting for a
3 jury note, but now the issue has been framed, and Mr. Fodeman
4 expressly argued that it didn't matter whether the equipment
5 was working or not.

6 We submitted briefs to your Honor on that question.
7 I stand by that proposition, that the statutory language makes
8 clear that it has to be capable of intercepting at a time of
9 possession. That can be inferred about what you say, but with
10 all due respect, I don't think in light of the rebuttal
11 summation, that it's clear enough, because if the jury simply
12 hears your Honor's instructions, and the last words from
13 Mr. Fodeman, from the lawyers, says it doesn't matter whether
14 it works or not, drawing an analogy to his blackberry, I think
15 there can be a conviction on a wrongful basis. The statutory
16 language is in the present tense. It's clear, and I think
17 that understanding, as lawyers, what the statute requires, I
18 think it's in the charge, but I don't think it's clear enough,
19 and we've had a lawyer say that it doesn't have to be working.
20 I think it should be clarified. That's my position.

21 THE COURT: The charge that I have in my hand was
22 unobjected to. What precisely do you want me to say now?

23 MR. SHARGEL: In the plainest of language, to say
24 that the equipment had to have been working and capable of
25 intercepting communications for Count Twelve at the time that

Charge of the Court

1908

1 it was brought into the country, and Count Thirteen at the
2 time that it was possessed in his office.

3 THE COURT: Denied.

4 (In open court.)

5 THE COURT: Okay. You have heard all the evidence.
6 You've heard the arguments of counsel. It's my job now to
7 instruct you on the applicable law.

8 You can't base your verdicts on any view of the law
9 other than the one that I give you in these instructions. As
10 all the lawyers told you during their summations, if there
11 appears to you to be any difference between the law as stated
12 by counsel and the law that I state to you now, of course,
13 it's my instructions on the law that you must follow.

14 Do not single out any one of these instructions as
15 alone stating the law. Rather, when you retire in a little
16 while to commence your deliberations, I want you to consider
17 my instructions to you as a whole.

18 I'll going to begin by giving you -- and just so you
19 know, I'm guessing this is going to last about forty-five
20 minutes, my charge -- I'm going to give you some instructions
21 about your role and the way you are to review the evidence in
22 the case. Then I'm going to give you instructions about the
23 particular crimes charged, and the elements the government
24 must prove with respect to each, and then I'll briefly give
25 you some instructions about your deliberations.

Charge of the Court

1909

1 In charging you on the applicable law, let me be
2 clear that I am expressing no opinion to you about how you
3 should decide the facts of the case. That's a task that, as I
4 mentioned this to you before, that's left exclusively to the
5 jury. Nothing I've said or done in the course of the trial,
6 or, for that matter, during the course of these instructions,
7 is intended to be taken by you as expressing any opinion on my
8 part about the facts, or the credibility of the witnesses, or
9 the weight to be given by you to any of the evidence. You are
10 the sole judges of the facts of the case.

11 I'm the judge of the law. You must find the facts
12 in accordance with the law as I give it to you now.

13 In determining the issues of fact presented in this
14 case, it's your duty as jurors to consider all the evidence
15 before you with complete impartiality, and to render your
16 verdict without bias or prejudice or sympathy as to either of
17 the defendants or the government. These parties, like all
18 parties who bring their disputes before this court, are equal
19 before the law, and you can assume, you should assume that the
20 case is important to both the government and to each of the
21 defendants.

22 The defendants Robert Simels and Arienne Irving are
23 before you because they have been charged in an indictment
24 with violations of federal law. The charges are just that.
25 They are accusations. They are not evidence. The defendants

Charge of the Court

1910

1 have pleaded not guilty to the charges against them. The
2 government must therefore prove those charges beyond a
3 reasonable doubt.

4 The government's burden to prove the defendants
5 guilty beyond a reasonable doubt never shifts to the
6 defendants. The defendant in a criminal case need not call
7 any witness nor produce any evidence. The law presumes each
8 defendant to be innocent of the charges against him or her,
9 and each defendant must be presumed by you to be innocent
10 throughout your deliberations. Only if you as a jury are
11 satisfied that the government has proved the defendant guilty
12 beyond a reasonable doubt as to a particular charge will the
13 presumption of innocence cease to operate. If the government
14 fails to prove a defendant guilty beyond a reasonable doubt,
15 you must find him or her not guilty. The presumption of
16 innocence alone is sufficient to require that a defendant be
17 found not guilty unless you, as jurors, are unanimously
18 convinced beyond a reasonable doubt of that defendant's guilt
19 on that particular charge.

20 What is a reasonable doubt? The words almost define
21 themselves. It's a doubt that's based upon reason and common
22 sense. It's a doubt that a reasonable person has after
23 carefully weighing all of the evidence or lack of evidence.
24 It's a doubt that would cause a reasonable person to hesitate
25 to act in a matter of importance in his or her own personal

Charge of the Court

1911

1 life. Proof beyond a reasonable doubt must therefore be proof
2 of such a convincing character that a reasonable person
3 wouldn't hesitate to rely and act upon it in the most
4 important of her own affairs. A reasonable doubt is not a
5 caprice or a whim, a reasonable doubt is not a speculation or
6 a suspicion. A reasonable doubt is not an excuse to avoid the
7 performance of an unpleasant duty. It is not sympathy. The
8 law doesn't require the government prove guilt beyond all
9 possible doubt. Proof beyond a reasonable doubt is sufficient
10 to convict.

11 If, after a fair and impartial consideration of all
12 the evidence or lack of evidence concerning a particular
13 charge against a particular defendant, you have a reasonable
14 doubt, it is your duty to acquit that defendant of that
15 charge. On the other hand, if, after a fair and impartial
16 consideration of all the evidence, you are satisfied of the
17 defendant's guilt beyond a reasonable doubt, you should vote
18 to convict.

19 I remind you that the defendants are being tried
20 here together, but in reaching your verdicts, you must bear in
21 mind that guilt is individual. Your verdict as to each
22 defendant must be determined separately with respect to that
23 defendant, solely on the evidence, or lack of evidence,
24 presented against him or her and without regard to the guilt
25 or innocence of anyone else.

Charge of the Court

1912

1 Your verdicts in the case must be based on the
2 evidence or lack of evidence. The evidence in this case
3 consisted of the testimony of the witnesses, both on direct
4 and cross-examinations; the evidence that the -- the exhibits,
5 rather, that were received in evidence by me; and the
6 stipulations by the parties that certain facts can be
7 considered to have been proved.

8 The statements made by the lawyers to you in
9 openings and closing statements are not evidence. Questions
10 as to which I sustained an objection are not evidence, and any
11 evidence that I ordered stricken during the course of the
12 trial is not evidence and must be entirely disregarded by you
13 during your deliberations.

14 As a general matter, the law recognizes two types of
15 evidence from which you can properly find the facts of the
16 case. One is direct evidence, such as the testimony of an
17 eyewitness to an event. The other is indirect or
18 circumstantial evidence, which is proof of a chain of
19 circumstances that points to the existence or nonexistence of
20 some other fact or facts. A simple example we use here of
21 circumstantial evidence is if you were to assume you came to
22 court on a nice, bright, dry, sunny day, and then after
23 several hours here in the courtroom, you saw people coming
24 through those rear doors, wearing wet raincoats and shaking
25 wet umbrellas. And if you were to further assume that I shut

Charge of the Court

1913

1 the blinds so you couldn't see out the window, well, in those
2 circumstances, you would have no direct evidence that it was
3 raining. You couldn't observe that, but you might infer it
4 from the circumstances you observed in the courtroom. You
5 might infer that the weather had changed and it had begun to
6 rain outside. That's what circumstantial evidence is all
7 about. Based on facts that you find to have been established,
8 you draw such reasonable inferences or conclusions as seem
9 justified to you in light of your experience and good judgment
10 and common sense.

11 The law makes no distinction between direct and
12 circumstantial evidence. You can consider and rely on both.
13 What the law requires is that before any defendant is
14 convicted of a crime, the jury be satisfied of that
15 defendant's guilt beyond a reasonable doubt based on its
16 assessment of all the evidence in the case.

17 In alleging dates, the charges refer to "on or
18 about," "on or about," or "between" particular dates. I may
19 make reference to those dates in my instructions to you. The
20 proof doesn't need to establish with certainty the exact date
21 of an alleged offense. The law requires only a substantial
22 similarity between the dates alleged and the dates established
23 by the evidence.

24 As jurors, you are the sole judges of the
25 credibility -- of the believability -- of the witnesses, and

Charge of the Court

1914

1 of the weight that the witnesses' testimony deserves. You
2 should carefully examine all the testimony given, the
3 circumstances under which each witness testified, and every
4 matter in evidence that tends to show whether or not a
5 particular witness is worthy of your belief. If you find that
6 any statement made by a witness from the witness stand was
7 false in whole or in part, you can disregard the particular
8 testimony you find was false, or, if you want, you can choose
9 to disregard that witness's entire testimony as unworthy of
10 your belief.

11 Your decisions in this regard, your credibility
12 decisions, may depend on how the witness impressed you when
13 the witness testified. Was the witness candid and forthright,
14 or did the witness seem to be hiding something or seem to you
15 to be evasive or suspect in some way? You may wish to
16 consider how the witness's testimony on direct examination
17 compared with the witness's testimony on cross. Was the
18 witness consistent in the testimony given, or were there
19 contradictions? Did the witness appear to you as someone who
20 knew what he or she was talking and was trying to report his
21 or her knowledge to you accurately? How much you choose to
22 believe a witness may be influenced by any interest the
23 witness may have in the outcome of the case or any bias that
24 you may have perceived the witness to have had. In this case,
25 one of the defendants, Robert Simels, testified and was

Charge of the Court

1915

1 subjected to cross-examination like any other witness. You
2 should examine and evaluate his testimony just as you would
3 the testimony of any witness who has an interest in the
4 outcome of the case.

5 You heard the testimony of law enforcement
6 witnesses. As I mentioned to you during jury selection, the
7 mere fact that a witness is employed as a law enforcement
8 officer does not make that witness's testimony deserving of
9 more or less consideration or greater or lesser weight than
10 the testimony of a non-law-enforcement witness. At the same
11 time, it's legitimate for defense counsel to question the
12 credibility of a law enforcement witness.

13 At bottom, it's your decision, after reviewing all
14 the evidence, whether to credit the testimony of a law
15 enforcement witness and, if so, what weight to give it.

16 You heard the testimony of an expert witness,
17 Anthony Ricco. Experts are witnesses who, by education or
18 experience, have acquired learning or experience or expertise
19 in a specialized area of knowledge. You should give the
20 expert opinions that were received in evidence in this case as
21 much or as little weight as you think they deserve.

22 You heard the testimony of Selwyn Vaughn, a paid
23 informant who was employed by the government to assist in the
24 investigation of the defendants.

25 The government is permitted to use and to compensate

Charge of the Court

1916

1 paid informants during its investigations and prosecutions.
2 However, because such informants have a financial incentive to
3 curry favor with the government, their testimony should be
4 scrutinized by you with care and viewed with caution by you
5 when you decide how much of it to believe and what weight to
6 give it. You should asks yourselves whether the informant
7 would benefit more by lying or by telling the truth. If you
8 believe that the witness was motivated by hopes of personal
9 gain, was the motivation one that would cause him to lie, or
10 was it one that would cause him to tell the truth? Did his
11 motivation color his testimony in any way?

12 On the other hand, your own personal feelings about
13 the government's use of confidential informants are
14 irrelevant, and should not enter into your deliberations in
15 any way. If you are satisfied beyond a reasonable doubt that
16 a particular defendant committed a particular crime charged,
17 the government's use of an informant is irrelevant to your
18 determination.

19 There was testimony during the trial that attorneys
20 interviewed witnesses in preparation for and during the course
21 of the trial. You must not draw any unfavorable inference
22 from that fact. To the contrary, attorneys are obliged to
23 prepare their cases as thoroughly as possible, and in the
24 discharge of that responsibility, they may properly interview
25 witnesses before the trial and indeed, as necessary,

Charge of the Court

1917

1 throughout the course of the trial.

2 The defendant Arienne Irving did not testify in the
3 case. Under our Constitution, a defendant has no obligation
4 to testify, or to present any other evidence, for that matter.
5 I remind you it's the prosecution's burden to prove a
6 defendant guilty beyond a reasonable doubt, a burden that
7 remains with the prosecution throughout the trial and never
8 shifts to a defendant. A defendant is never required to prove
9 that he or she is innocent, and, of course, is never required
10 to take the witness stand.

11 You may not attach any significance to the fact that
12 Ms. Irving chose not to testify. No adverse inference against
13 her may be drawn by you because she chose not to take the
14 witness stand. You can't consider this against her in any way
15 during your deliberations. Indeed, I order you not even to
16 discuss the fact that Ms. Irving did not testify, during your
17 deliberations.

18 You heard testimony and argument by counsel about
19 other participants in the events giving rise to this case who
20 are not defendants in the case. Don't speculate about the
21 reasons for that. The only issue in this case is whether the
22 government has proven the charges against these defendants
23 beyond a reasonable doubt. Also, the question of the possible
24 punishment of a defendant, should that become necessary, is of
25 no concern to the jury, and it should not in any sense enter

Charge of the Court

1918

1 into or influence your deliberations. The duty of imposing
2 sentence, should that become necessary, rests exclusively with
3 me, the Court. Your function is to weigh the evidence in the
4 case and to determine whether or not the defendants have been
5 proven guilty beyond a reasonable doubt, solely on the basis
6 of the evidence. Under your oath as jurors, you cannot allow
7 a consideration of the punishment that may be imposed upon a
8 defendant, should he or she be convicted, to influence your
9 verdicts in any way, or in any sense to enter into your
10 deliberations.

11 As I've instructed you, you should consider both the
12 evidence and the lack of evidence at arriving at your
13 verdicts, but be aware that the government is under no
14 obligation to use all available investigative techniques. Its
15 sole obligation, to prove the elements of the offenses charged
16 beyond a reasonable doubt. When the parties agree on the
17 existence of a fact, their agreement is called a stipulation.
18 You the jury must accept such a stipulation and consider the
19 stipulated fact proven beyond a reasonable doubt.

20 Let me turn to the charges in the case, and since
21 they all implicate the concepts of knowledge and intent, let
22 me discuss these with you before I turn to the elements of the
23 particular charges.

24 A person acts knowingly if he acts intentionally and
25 voluntarily, and not because of ignorance, mistake, accident

Charge of the Court

1919

1 or carelessness. Whether a defendant acted knowingly may be
2 proven by his or her conduct and by all the facts and
3 circumstances surrounding the case.

4 A person acts intentionally when he acts
5 deliberately and purposefully. That is, a defendant's acts
6 must have been the product of his conscious objective rather
7 than the product of mistake or accident. It's sufficient that
8 a defendant intentionally engages in the conduct that the law
9 forbids. By that I mean, the government is not required to
10 prove that the defendant is aware of the particular law that
11 forbids the conduct in which a defendant knowingly and
12 intentionally engaged.

13 Let me turn to the specific counts, and I emphasize,
14 again, what I said earlier, which is, you have to consider the
15 evidence separately with respect to each defendant and each
16 count. You'll be asked to render separate verdicts with
17 respect to each defendant and each of the counts they face,
18 and you'll take back with you into the jury room a verdict
19 sheet, a separate verdict sheet, for each defendant for each
20 charge that the defendant is facing.

21 By way of overview, both defendants are charged with
22 conspiring to tamper with witnesses in the case against Roger
23 Khan by intimidation, threats and corrupt persuasion, with the
24 intent to influence or prevent the testimony of those
25 witnesses or cause them to withhold their testimony. Then,

Charge of the Court

1920

1 after the conspiracy charge, I'll charge you on the eight
2 separate charges of attempted witness tampering; those charges
3 are identical, except for the witness the defendants are
4 alleged to have tampered with, and with respect to one of
5 those eight counts, Ms. Irving is not charged at all. Then
6 both defendants are charged with attempting to bribe Leslyn
7 Camacho. Both are also charged with both importing and
8 possessing this eavesdropping equipment about which you heard
9 ample argument, and Simels alone is charged with making a
10 false statement to that prison employee, Ms. Waite, when
11 Simels went to visit David Clarke.

12 So, Count One is the conspiracy to tamper with
13 witnesses. It charges the defendants with conspiring, between
14 August 2006 and September 2008, to tamper with witnesses in a
15 narcotics-trafficking trial of Roger Khan. More specifically,
16 the government alleges that the defendants and others
17 conspired to corruptly persuade Selwyn Vaughn, David Clark,
18 George Allison, also known as "Chinaman," Vijai Jainarine,
19 also known as "Son," Ryan Pemberton, also known as "Sancho,"
20 Leslyn Camacho, Alicia Jagnarain, and Farrah Singh to either
21 testify in conformity with the defendant's theory of the case,
22 or to refuse to testify through the offer of money or through
23 actual or threatened violence.

24 A conspiracy is a criminal partnership, an agreement
25 involving two or more people to violate the law. A conspiracy

Charge of the Court

1921

1 to commit a crime is an offense distinct from the underlying
2 crime that the conspirators agreed on and intended to commit.

3 To prove the crime of conspiracy, the government
4 must prove beyond a reasonable doubt two elements:

5 First, that two or more people entered into the
6 charged conspiracy, and again, I remind you the charged
7 conspiracy is a conspiracy to intimidate, threaten and
8 corruptly persuade others with the intent to influence or
9 prevent their testimony in the Khan case or to cause them to
10 withhold their testimony in that case.

11 The second element of a conspiracy charge is that
12 the defendant you are considering became a member of the
13 conspiracy with knowledge of its criminal goal or goals, and
14 intending by his or her actions to help it succeed.

15 So, those are the two elements, and let me elaborate
16 a little bit on both of the elements for you.

17 The first is that the government must prove beyond a
18 reasonable doubt that two or more people entered into the
19 unlawful agreement charged. One person can't commit the crime
20 of conspiracy alone, nor, I should add, can someone conspire
21 with an undercover agent or an informant, such as Selwyn
22 Vaughn. Rather, the proof must convince you that at least two
23 persons (not including Vaughn) joined together in the common
24 criminal scheme alleged.

25 Now, the government doesn't need to prove an express

Charge of the Court

1922

1 or formal agreement. It doesn't need to prove that the
2 alleged conspirators stated, in words or writing, what the
3 scheme was, or what its object or purposes were, or the means
4 by which they would be accomplished. It's sufficient if the
5 proof establishes that the conspirators tacitly came to a
6 mutual understanding to accomplish an unlawful act by means of
7 a joint design or a common plan.

8 Since a conspiracy is, by its very nature,
9 characterized by secrecy, direct proof may not be available.
10 You may therefore infer the existence of a conspiracy from the
11 circumstances of the case and from the conduct of the parties
12 involved. In a very real sense, then, in the context of
13 conspiracy cases, actions often speak louder than words. You
14 may, in determining whether an agreement existed here,
15 consider the actions and statements of all those you find to
16 be participants as proof that that common design existed to
17 act together to accomplish the unlawful purpose of the charged
18 conspiracy. That is the first element, the existence of the
19 conspiracy charged.

20 The second element that has to be proved beyond a
21 reasonable doubt is that the defendant you are considering
22 became a member of the charged conspiracy with knowledge of
23 its criminal goal or goals, and intending, by his or her
24 actions, to help the conspiracy succeed. I've explained to
25 you what it means to act knowingly and intentionally. But in

Charge of the Court

1923

1 the context of the conspiracy charge that you will consider, I
2 want to stress that merely being present at a place where
3 criminal conduct is underway doesn't make a person a member of
4 the conspiracy to commit the crime. This is true even if the
5 person knows that a crime is being committed. By the same
6 token, the fact that a person, without knowledge that a crime
7 is underway, merely happens to act in a way that furthers the
8 purpose or objectives of the conspiracy doesn't make a person
9 a conspirator. More is required under the law. What is
10 required is that a defendant must have participated with
11 knowledge of at least some of the purposes or objectives of
12 the conspiracy, and with the intention of aiding in the
13 accomplishment of the unlawful goals of the conspiracy.

14 In sum, a defendant with an understanding of the
15 unlawful character of the conspiracy, must have intentionally
16 engaged, advised or assisted in it for the purpose of
17 furthering the illegal undertaking.

18 Now, the extent of a defendant's participation in a
19 conspiracy has no bearing on the issue of guilt. Each member
20 of a conspiracy may perform separate and distinct acts and may
21 perform them at different times. Some conspirators may play
22 major roles, while others play minor roles. A defendant need
23 not have known the identities of each and every member of a
24 scheme. He or she need not have been fully informed as to all
25 the details or the scope of the conspiracy. He or she need

Charge of the Court

1924

1 not have been a member of the conspiracy for its entire
2 duration. The key inquiry is simply whether the defendant you
3 are considering joined the conspiracy charged with an
4 awareness of at least some of its basic aims and purposes, and
5 with the intent to help the conspiracy succeed in achieving
6 those unlawful goals.

7 So, that's what it means to conspire to commit a
8 crime. The government needs to prove beyond a reasonable
9 doubt that the charged agreement existed, and, second, that
10 the defendant you are considering became a member of that
11 agreement.

12 Let me explain to you the elements of the crime of
13 witness tampering, and that's the claim that Simels and Irving
14 are charged with conspiring to commit. Now, these
15 instructions that I'll give you about witness tampering play a
16 role in nine of the charged crimes. With regard to Count One,
17 they describe the crime that the conspirators allegedly agreed
18 to commit. And in a few minutes, when I turn to Counts Two
19 through Nine, which each focus on a particular person, what
20 I'm going to tell you now describes the crime that the
21 defendants are alleged to have attempted to commit. Okay.
22 The crime of witness tampering has two elements that must be
23 proved beyond a reasonable doubt.

24 First, that the defendant used intimidation on,
25 threatened, or corruptly persuaded another person, and,

Charge of the Court

1925

1 second, that the defendant acted knowingly and with the intent
2 to either influence or prevent the testimony of any person in
3 an official proceeding or caused or induced any person to
4 withhold testimony from an official proceeding.

5 (Continued on next page.)
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Charge of Court

1926

1 THE COURT: (Continuing)

2 Intimidation includes frightening a person,
3 inspiring or affecting him or her by fear or deterring him or
4 her by threats.

5 To "threaten" means to express through words or
6 gestures or both an intention to do harm.

7 A defendant need not intend to carry out the threat.
8 It doesn't matter whether the person threatened is actually
9 frightened or thinks he or she is in physical danger. It is
10 enough that the threat had a reasonable tendency to make the
11 person fearful.

12 The phrase "corruptly persuades" means to act
13 knowingly and with a wrongful or evil purpose, to convince or
14 induce another person to engage in certain conduct.

15 Those are the elements of the crime of witness
16 tampering, which in Count One the defendants are charged with
17 conspiring to commit and in counts two through nine they are
18 charged with attempting to commit. I will get to those
19 charges in a minute.

20 Before I leave Count One, let me tell you what I
21 mentioned to you during the trial before Anthony Ricco
22 testified, that is, conduct by a lawyer that amounts to
23 lawful, bona fide legal representation of the lawyer's client,
24 does not violate the witness tampering statute. "Bona fide"
25 means in good faith, which is a state of mind, consisting of

Charge of Court

1927

1 honesty and belief of purpose, faithfulness to one's duties or
2 obligations, or observance of a reasonable standard of fair
3 dealing in a given profession.

4 You heard testimony from Mr. Ricco on the subject of
5 representing defendants in criminal cases. In considering the
6 conspiracy charged in Count One, and in considering all of the
7 attempted witness tampering charges I will be turning to in a
8 few moments, you may consider that testimony, along with all
9 the other evidence in the case, in determining whether the
10 government has proven beyond a reasonable doubt the elements
11 of the particular crime charged and that the conduct of the
12 defendant you are considering did not constitute lawful bona
13 fide legal representation.

14 As to Counts one through nine, Robert Simels argues
15 that he was providing lawful, bona fide legal representation
16 on behalf of Roger Khan. I instruct you that it is
17 permissible for an attorney to interview a potential witness
18 against his or her client, even if that potential witness is
19 represented by counsel. It's also permissible for an attorney
20 to retain an investigator to locate potential witnesses and to
21 make payments to obtain information, as long as those payments
22 are not made to influence a witness' testimony in court.

23 Simels, like any defendant, has the right if he
24 chooses to have me instruct the jury on his theory of defense
25 on each count. I have done so here with regard to Count One

Charge of Court

1928

1 and I will continue to do so as I go through the rest of the
2 counts. However, bear in mind that a defendant has no
3 obligation to prove his theory of defense. At all times the
4 burden is on the government to prove beyond a reasonable doubt
5 the elements of charged crime.

6 Let me turn to this string of counts that charge
7 attempt to tamper with a witness. Those are counts two
8 through nine.

9 Count Two charges the defendants with attempting,
10 between May 2008 and September 2008, to tamper with Selwyn
11 Vaughn in the narcotics trial of Roger Khan.

12 As I mentioned a few moments ago, this offense has
13 two elements.

14 First, that the defendant attempted to corruptly
15 persuade Selwyn Vaughn.

16 And, second, that the defendant you are considering
17 acted knowingly and with the intent to influence or prevent
18 the testimony of Vaughn in the Khan trial or with the intent
19 to cause Vaughn to withhold his testimony from that trial.

20 I have already told you what it means to "corruptly
21 persuade" someone. You will apply those instructions in
22 connection your consideration of this charge.

23 In this count, and in this seven other witness
24 tampering charges I will be discussing with you momentarily,
25 the government has not charged the defendants with the

Charge of Court

1929

1 completed crime. Rather, it has charged them with attempting
2 to commit the crime. Here, in Count Two, with attempting to
3 tamper with Selwyn Vaughn.

4 A defendant attempts a crime when he or she takes a
5 substantial step towards committing a crime, with the intent
6 to commit the crime. Mere preparation, which may consist of
7 planning the offense or of devising or obtaining or arranging
8 for a means for its commission is not an attempt. The acts of
9 a person who intends to commit a crime will constitute an
10 attempt when the acts themselves clearly indicate an intent to
11 commit the crime, and the acts are a substantial step in a
12 course of conduct planned to culminate in the commission of
13 the crime.

14 The government -- this is in connection with this
15 Count Two -- that Robert Simels and/or Arienne Irving
16 attempted to have Selwyn Vaughn testify falsely regarding, for
17 example, the nature of his job, the relationships between
18 Roger Khan and others, Khan's lack of involvement in drug
19 trafficking and other crimes, and David Clarke's activities in
20 or about 2002.

21 For his part, Simels contends that he was using
22 Vaughn to locate persons who were sources of information or
23 potential witnesses for or against Khan. He further argues
24 that he did not attempt to cause Vaughn to threaten,
25 intimidate, or corruptly persuade any potential witness, and

Charge of Court

1930

1 that he did not intend to call Vaughn himself as a witness at
2 Khan's trial.

3 Count Three charges attempt to tamper with a
4 witness, and it focuses on David Clarke.

5 It alleges that, between May of 2008 and September
6 of 2008, the defendants attempted to tamper with David Clarke.

7 All of these attempt charges relate to that period,
8 May of 2008.

9 No. I guess not.

10 This Count Three, which relates to Clarke, focuses
11 on the period between approximately May 2008 and
12 September 2008. The offense has two elements.

13 First, that the defendant attempted to use
14 intimidation on, or to threaten, or corruptly persuade David
15 Clarke.

16 Second, that the defendant acted knowingly and with
17 the intent to influence or prevent the testimony of Clarke in
18 the Khan trial, or with the intent to cause Clarke to withhold
19 his testimony from that trial.

20 I have explained to you the meaning of these words,
21 "threat," "intimidate" and the phrase "corruptly persuade."
22 They have the same meaning throughout these instructions and
23 you will apply those definitions throughout your
24 deliberations.

25 The government alleges that Simels and Irving

Charge of Court

1931

1 attempted, through Vaughn, to have Clarke either refuse to
2 testify or to testify in conformity with the defense theory of
3 the case -- for example, that he and Khan were enemies and not
4 involved together in drug trafficking -- through the payment
5 of money or through acts or threats of violence.

6 Simels argues that he was attempting to contact
7 Clarke to interview him and to obtain information relevant to
8 the case against Khan, and that he intended to dissuade Clarke
9 from offering what he believed to be false testimony against
10 Khan. Simels argues that he did not attempt to make any
11 payments to Clarke.

12 Count Four alleges an attempt to tamper with a
13 witness, and it focuses on George Allison, also known as
14 Chinaman.

15 It focuses on the period between May of 2008 and
16 September of 2008. The elements of this crime are the same as
17 the elements with regard to Count Three with regard to Clarke.

18 The government alleges that Simels and Irving
19 attempted, through Vaughn, to have Allison either refuse to
20 testify or to testify in conformity with the defense theory of
21 the case -- for example, to Khan's lack of involvement in drug
22 trafficking -- through the payment of money or through acts or
23 threats of violence.

24 Simels argues that he was attempting to locate
25 Allison in order to interview him to obtain information

Charge of Court

1932

1 relevant to Khan's defense. He argues that he did not attempt
2 to cause Selwyn Vaughn to threaten or intimidate Allison.

3 Count Five alleges attempt to tamper with Vijai
4 Jainarine, also known as Son.

5 It focus on that May to September 2008 period. The
6 elements are the same as the elements with regard to counts
7 three and four.

8 The government alleges that Simels and Irving
9 attempted, through Vaughn and others, to have Vijay Jainarine
10 either refuse to testify or testify in conformity with the
11 defense theory of the case, through the payment of money or
12 through act or threats of violence.

13 Simels argues that he was attempting to contact
14 Jainarine in order to interview him to obtain information
15 relevant to Khan's defense and that he intended to dissuade
16 Jainarine from offering what he believed to be false testimony
17 against Khan. Simels argues that he did not attempt to cause
18 Vaughn to threaten or intimidate Jainarine.

19 Count Six alleges attempt to tamper with the
20 witness, and it focuses on Ryan Pemberton, also known as
21 Sancho. It focuses on the same time period.

22 The elements of this offense are the same as the
23 elements of count three through five.

24 The government alleges that Simels attempted,
25 through others, to have Ryan Pemberton either refuse to

Charge of Court

1933

1 testify or testify in conformity with the defense theory of
2 the Khan case, through the payment of money or through the
3 acts or threats of violence.

4 Simels argues that he was attempting to locate
5 Pemberton to interview him to obtain information relevant to
6 the defense of the Khan case. He argues that the draft
7 affidavit seized from his office was based on information
8 Simels believed to be true, and that the affidavit was not
9 even sent to Guyana, where Pemberton was located. He further
10 argues that he did not attempt to have any person threaten or
11 intimidate Pemberton.

12 Count Seven alleges attempt to tamper with Leslyn
13 Camacho.

14 It focuses on that May 2008 to September 2008 time
15 period. The elements are the same as the elements of counts
16 three through six.

17 The government alleges that Simels and Irving
18 attempted, through Vaughn, to have Camacho either refuse to
19 testify or testify in conformity with the defense theory of
20 the Khan case, by paying her money.

21 Simels argues that he was attempting to locate
22 Camacho in order to interview her to obtain information about
23 Clarke relevant to the defense of the Khan case. He argues
24 that he intended to dissuade Clarke from offering what Simels
25 believed to be false testimony against Khan. He further

Charge of Court

1934

1 argues that he did not attempt to make any unlawful payments
2 to Camacho.

3 Count Eight is the second to last of the attempt to
4 tamper with a witness charges. It focus on Alicia Jagnarain.

5 Is this right? May 2007 or should that say May
6 2008?

7 MR. D'ALESSANDRO: It is correct as it is written,
8 Your Honor.

9 THE COURT: Okay. Time period alleged is May 2007
10 to September 2008. The elements are the same as the elements
11 I have described for you in counts three through seven.

12 The government's theory of the case is that Simels
13 and Irving attempted, through Vaughn and others, to have
14 Jagnarain either refuse to testify or to testify in conformity
15 with the defense theory of the Khan case, through the payment
16 of money or through acts or threats of violence.

17 Simels argues that he was attempting to locate
18 Jagnarain in order to interview her and obtain information
19 relevant to the defense of the Khan trial and that he intended
20 to dissuade her from offering what Simels believed to be false
21 testimony against Khan. He further argues that he did not
22 attempt to cause Vaughn to threaten or intimidate Jagnarain.

23 Count Nine, it is the last of attempt to tamper
24 counts. It focuses on Farrah Singh.

25 It alleges that between May of 2008 and September of

Charge of Court

1935

1 2008, the defendants attempted to tamper with her. The
2 elements of the crime are the same as the elements of counts
3 three through eight.

4 The government alleges that Simels and Irving
5 attempted, through Vaughn, to have Farrah Singh testify in
6 conformity with the defense theory of the case -- for example,
7 that Alicia Jagnarain is unworthy of belief -- through the
8 payment of money or through acts or threats of violence.

9 Simels argues that he was attempting to locate Singh
10 in order to interview her to obtain information relevant to
11 Khan's case. He argues that Singh was not a potential witness
12 at Khan's trial.

13 (Continued on next page.)
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1 THE COURT: And you'll see this from the verdict
2 sheets, but I should make explicit what was implicit when I
3 spoke to you about Count Six, which is that Ms. Irving is not
4 charged with regard to the Ryan Pemberton count. She is not
5 included as a defendant in the attempt to tamper with Ryan
6 Pemberton.

7 Now, you heard reference to this in Mr. Shargel's
8 summation. With regard to Count One, conspiracy to tamper
9 with witnesses, Count Three, attempt to tamper with charge,
10 Count Five, attempt to tamper with Jagnarain, Count Six,
11 attempt to tamper with Pemberton, Seven, attempt to tamper
12 with Camacho, and Eight, attempt to tamper with Singh, Simels
13 also argues that his conduct existed solely of lawful
14 behavior, and that his sole intention was to encourage, induce
15 or cause those prospective witnesses to testify truthfully
16 about Khan, or, in any event, not to testify falsely against
17 him.

18 This defense is referred to in the law as the
19 truth-seeking defense, and it's what we call an affirmative
20 defense as to which the defendant Simels bears the burden of
21 proof, and his burden is a burden of proof by a preponderance
22 of the evidence.

23 So, only as to this narrow issue, which relates to
24 the particular charges I've just identified, is it the case
25 that the defendant has a burden, the defendant Simels has a

1 burden. In all other respects, what I have told you remains
2 true, that the government at all times bears the burden of
3 proof beyond a reasonable doubt.

4 But in this context, Simels must affirmatively prove
5 this defense by a preponderance of the evidence. What this
6 means is that even if you find that the government has proved
7 all of the elements of those charges beyond a reasonable doubt
8 with regard to Simels, you must nevertheless find him not
9 guilty if he proves, with respect to one of those particular
10 counts, or all of them, the truth-seeking defense by a
11 preponderance of the evidence. Simels establishes this
12 defense if he proves by a preponderance of the evidence that
13 he was only engaged in lawful conduct in that his sole
14 intention was to encourage the potential witness to testify
15 truthfully, or, in any event, not to testify falsely against
16 Khan.

17 To prove something by a preponderance of the
18 evidence means something different than proving something by
19 beyond a reasonable doubt. But a preponderance of the
20 evidence is a lesser standard, and it means to prove something
21 is more likely true than not true. In this context, it means
22 the greater weight of the evidence.

23 If the evidence appears to be equally balanced, you
24 must resolve this question against Simels. However, I
25 emphasize that the fact that Simels has raised this

1 affirmative defense in no way relieves the government of its
2 burden of proving all of the elements of these crimes, these
3 charges, Counts One, Three, Five, Six, Seven and Eight, beyond
4 a reasonable doubt, as I've defined that burden and the
5 elements of those crimes for you.

6 So, I'm turning away now from the attempt to tamper
7 with witnesses charges. Let me turn to Charge Ten, Count Ten,
8 which charges the defendants with bribery of a witness, and it
9 relates to Leslyn Camacho.

10 Before you can find the defendant you are
11 considering guilty of this bribery charge, the government --
12 you must find that the government proved beyond a reasonable
13 doubt two elements. First, that between May of 2008 and
14 September 2008, the defendant you are considering indirectly
15 offered or promised money to Leslyn Camacho, and, second, that
16 the defendant you are considering did so for or because of the
17 testimony to be given by Ms. Camacho in the trial of Roger
18 Khan.

19 Again, I remind you you must consider the evidence
20 separately with regard to each defendant on each count. The
21 bribery statute makes no distinction between offering,
22 promising or giving a bribe. The mere offer or promise of a
23 bribe is just as much a violation of statute as the actual
24 giving of a bribe. However, a defendant must actually intend
25 to offer a bribe. If he or she is only trying to trick the

1 offeree into believing that a bribe has been offered, the
2 defendant's conduct does not violate the bribery statute.
3 Simels argues that he did not intend to pay a bribe to
4 Camacho, and that the words spoken to Vaughn were a ruse to
5 induce Camacho to come to his office.

6 Count Eleven, the only defendant in this count is
7 Simels, and it charges that on March 27, 2008, he falsely
8 stated to a representative of GEO Group that he represented
9 David Clarke. This GEO Group is a private company managing a
10 detention facility pursuant to a contract with the United
11 States Bureau of Prisons, which is part of the Department of
12 Justice.

13 In order to prove the defendant guilty of this
14 count, the government must prove beyond a reasonable doubt:
15 First, that Simels made the statement he's charged with
16 making, which is that he actually represented David Clarke;
17 second, that the statement or representation was material;
18 third, that it was false; fourth, that he knew it was false,
19 Simels knew it was false; and fifth, that the statement was
20 made in a matter within the jurisdiction of the government of
21 the United States.

22 Most of those elements are self-explanatory, but let
23 me say that a fact is material if it could have influenced the
24 government's decision or activity. The government is not
25 required to prove that the persons at the jail actually relied

1 on the statement, but it must prove beyond a reasonable doubt
2 the materiality of the statement at issue, and that is, that
3 it could have influenced the government's decisions or
4 activity. To be within the jurisdiction of the government of
5 the United States means that the statement must concern an
6 authorized function of the government. Simels argues in
7 connection with this charge that he did not make a false
8 statement to an official at the GEO Group detention facility.

9 Counts Twelve and Thirteen relate to this equipment
10 that's down on the table. Count Twelve alleges that between
11 September of 2007 and June of 2008, the defendants imported
12 eavesdropping equipment.

13 Before you can find either defendant guilty of this
14 crime, the government must prove beyond a reasonable doubt
15 each of the following elements:

16 First, that the defendants intentionally sent
17 through the mail or the defendant that you are considering
18 intentionally sent through the mail or sent or carried in
19 foreign commerce a device;

20
21 Second, that when the device was sent, its design
22 rendered it primarily useful for surreptitiously intercepting
23 wire, oral or electronic communications;

24 Third, that when the defendant you are considering
25 sent the device, he or she knew or had reason to know that the

1 device -- that the design of the device rendered it primarily
2 useful for this purpose

3 Those are the three elements.

4 "Foreign commerce" means commerce between anyplace
5 place in the United States and any place outside the United
6 States. A device is primarily useful for a particular purpose
7 if most people who obtain the device use it for that purpose.

8 An interception is surreptitious when it's
9 accomplished without the consent of all parties to the
10 intercepted communication. "Wire communications" include
11 cellular telephone calls.

12 Count Thirteen also pertains to this equipment. It
13 alleges that during the same time period, the defendants
14 possessed the alleged eavesdropping equipment.

15 Before you can find the defendant you are
16 considering guilty of this charge, the government must prove
17 beyond a reasonable doubt that the defendant you are
18 considering:

19 First, intentionally possessed eavesdropping
20 equipment or a device;

21

22 Second, that at the time of the possession, the
23 design of the device rendered it primarily useful for
24 surreptitiously intercepting wire, oral or electronic
25 communications;

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Third, that at the time of the possession, the defendant you are considering knew or had reason to know that the design of the device rendered it primarily useful for that purpose;

Fourth, that at the time of the possession, the defendant knew or had reason to know that the device had been sent through the mail or sent in foreign commerce.

I've explained to you the key phrases, "primarily useful" and "surreptitious" already. They have the same meaning here.

With regard to possession, the law recognizes two types of possession: Actual possession, which is when a person physically holds something. The other is what we call constructive possession, which means you don't physically hold it, but you have the power and the intention to exercise control over it, dominion over it.

So, for example, a person who keeps valuables in a safe deposit box or a bank wouldn't have physical possession of the bank vault, but would have constructive possession of those items. A person can have constructive possession of something without ever actually touching it, and constructive possession can arise even when someone else is actually physically possessing the item in question.

1 Whereas possession, actual or constructive, has to
2 be proved beyond a reasonable doubt, proof of ownership
3 doesn't.

4 As to these counts, Twelve and Thirteen, Simels
5 argues that he didn't know or have reason to know that the two
6 Panasonic laptop computers and bases that are the subject of
7 these counts were capable of surreptitious interception of
8 wire, oral or electronic communications at the time he
9 imported them or possessed them.

10 He argues that in fact, they were not capable of
11 surreptitious interception at the time that he imported or
12 possessed them. He argues that his sole intention was to
13 utilize the recordings made using that equipment to defend
14 Khan in his criminal case, and to provide the government with
15 access to the equipment, and to inspect it in advance of the
16 narcotics-trafficking trial of his client Roger Khan.

17 All right.

18 Those are the charges and the elements of the
19 charges.

20 In a few minutes, you're going to retire and
21 commence your deliberations. Traditionally, you need a
22 foreperson for your deliberations in order for them to proceed
23 in an orderly way, and traditionally, Juror No. One acts as a
24 foreperson. But that's not binding on you. You're free to
25 choose another juror to act as foreperson, if you wish.

1 Obviously, the foreperson's vote and the foreperson's views
2 about the weight and effect of the evidence are not entitled
3 to greater weight than the vote and the views of the other
4 jurors.

5 Your function, ladies and gentlemen, is to reach a
6 fair conclusion based on the evidence in the case within the
7 framework of the law as I've given it to you. There could
8 hardly be a more important function. Your verdicts in the
9 case must be unanimous. You must all agree on each and every
10 entry that is made on these verdict sheets, and in fact, I'll
11 ask you, after your verdicts are announced, whether each of
12 you -- whether the announced verdicts are the verdicts of each
13 of you individually.

14 When you return to the jury room this time, I'm not
15 going to say, Don't discuss the case. I'll stop saying that
16 from now on, because now, it's your duty to do just that, to
17 discuss the case, to consult with each other about the
18 evidence about the issues in the case with a view towards
19 reaching agreement on your verdicts, provided you can do so
20 without violating your individual judgment and your
21 conscience.

22 During the course of your deliberations, you
23 shouldn't surrender a conscientious belief as to what the
24 truth is and what the weight and the effect of the evidence
25 is, and each of you has to decide the case for yourselves and

1945

1 not simply acquiesce in the conclusions of your fellow jurors.

2 On the other hand, I do ask you to examine the
3 issues and the evidence before you with candor, with
4 frankness, with an open mind, with the appropriate degree of
5 deference to the views of each other. Listen to each other,
6 discuss the issues and the evidence before you. Don't
7 hesitate, during your deliberations, to change your opinions
8 from time to time if you're convinced they are wrong.

9 Remember that the parties and the Court are relying
10 on you to give a full and conscientious consideration and
11 deliberation to the evidence and issues before you. Only by
12 doing so will you carry out to the fullest your oath as
13 jurors, which is to well and truly try the issues in the case
14 and to render true verdicts.

15 If it becomes necessary during your deliberations to
16 communicate with me for any reason, just send me a note that's
17 signed by your foreperson. Please don't attempt to
18 communicate with me in any way other than in such a note, and
19 I won't communicate with you except in writing after
20 consulting with counsel or orally here in open court, again,
21 after consulting with counsel.

22 If you want to have any of the testimony repeated,
23 simply say so in a note that you will give to the marshal, who
24 will be outside the room during your deliberations.

25 If that happens, let me say two things to you. One,

1 be as specific as you can. If you only want a particular
2 witness's testimony, tell us that. If you only want part of a
3 particular's witness's, testimony tell us that, too. Second,
4 being be patient. It always takes longer to comply with the
5 jury's readbacks requests than juries think it should. We
6 have to sift through the record and find what's responsive to
7 your requests. So, don't think we have ignored it, if you ask
8 for a readback of testimony, that it takes some time to either
9 send the transcript into the jury room or bring you back into
10 court to read the testimony back to you.

11 If you want to see any of the exhibits that were
12 received in evidence, simply say so in a note. We'll send the
13 exhibits into the jury room for your inspection. If you want
14 to hear any of the tapes in evidence, say so. We'll bring you
15 back into open court and play those tapes for you.

16 When you've reached your verdicts, send me a note,
17 signed by your foreperson, that says, The jury has reached its
18 verdicts, and don't say anything else in that note. Don't
19 tell us what the verdicts are. For that matter, throughout
20 your deliberations, don't indicate to us in any way how you
21 stand in your deliberations. We don't want to know that.
22 It's your business.

23 Don't give us a numerical count as to how you stand
24 or anything like that. And when you've reached a verdict,
25 just say that you have reached your verdicts and nothing else.

1947

1 All right. Let me see counsel, please, at sidebar,
2 to see if there's anything else I need to tell you.

3 (Continued on next page.)
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1 (Side bar.)

2 THE COURT: I want to keep two alternates.

3 THE CLERK: Juror number one has to go to the
4 restroom.

5 (In open court.)

6 THE COURT: Go ahead. Rush in there. Then come
7 back out.

8 Anybody else? Only if it is an emergency.

9 All right. It is an emergency. Go ahead. But be
10 quick and come right back out. Let's not open the flood gates
11 here. It's only going to take minute or two.

12 (Side bar.)

13 MR. SHARGEL: No pun intended.

14 THE COURT: No pun intended.

15 Any objection to the verdict sheet, by the way?
16 Separate verdict sheets.

17 MR. SHARGEL: May I look at it?

18 MR. SOLANO: May I see it?

19 THE COURT: Sure.

20 MR. SHARGEL: With respect to the charge --

21 MR. SOLANO: No, Your Honor.

22 MR. SHARGEL: No objection.

23 With respect to the charge, I want to preserve the
24 arguments that I made up until this point. I don't think I
25 need to catalog them now.

1 There is one thing that I apparently I dropped the
2 ball on. It is this. The -- it was late when we requested
3 the affirmative defense, 1512(e), I believe, and my position,
4 and I think the request was that as to each of the tampering
5 charges, and I see that what Your Honor did is rely on our
6 version of the offense on the question of whether it was to
7 seek the truth but the entire effort in defending Khan, as I
8 argued in summation, as I argued in opening, I postured during
9 the case, was that this defense would apply to everything
10 because this whole representation of Khan was for the purpose
11 of eliciting the truth and dissuading false testimony.

12 Even going out interviewing Farrah was with an
13 attempt to get her to -- I am not sure that that's a perfect
14 example. A perfect example is George Allison. The reason
15 they wanted to talk to George Allison was to find out whether
16 he was a witness or not a witness, was, again, toward ensuring
17 that the truth was presented.

18 Pursuant to Rule 30(d), all that is required is I
19 take exception before deliberations begin. So even though
20 Your Honor was good enough to give us versions of this, your
21 version of the charge, I think that Rule 30(d) --

22 THE COURT: Can I interrupt you for a second?

23 MR. SHARGEL: Yes.

24 THE COURT: This is a 1512(b) -- 1512 affirmative
25 defense? You want me to tell the jury it applied --

1 MR. SHARGEL: To every count.

2 THE COURT: One through nine?

3 MR. SHARGEL: Yes.

4 THE COURT: I'll tell them that.

5 Any objection?

6 MR. D'ALESSANDRO: No.

7 MR. SHARGEL: Thank you.

8 I don't know if anyone else has anything.

9 THE COURT: Any other objections?

10 MR. D'ALESSANDRO: There is nothing that I think
11 that you need to go back. My understanding is Your Honor's
12 preference is not to send the jury charge back. But I think
13 that in the writing of the GO offense, it says that the GO was
14 under contract with the Bureau of Prisons. I think that we
15 corrected that to the Marshal Service. It's an immaterial
16 issue as it is. I don't believe we need to highlight it for
17 the jury. But if the jury charge goes back, I think we should
18 need to correct that.

19 There is no objection other than that.

20 MR. SHARGEL: No objection either way.

21 THE COURT: Okay.

22 MR. D'ALESSANDRO: Putting it on the record, Judge.

23 THE COURT: Yes.

24 (Continued on next page.)

25

1 (In open court.)

2 THE COURT: Okay. A couple of things.

3 First, I am only going to keep two alternates during
4 deliberations. Which means, Ms. Jackson, Ms. Hodges, you get
5 to be excused with the thanks of the Court and the parties.

6 Obviously, this case itself demonstrates how
7 important it is to have alternates, how they sometimes
8 substitute for the jurors one through twelve.

9 But I don't think it is necessary to keep all four
10 of you during deliberations. So I think we are just going to
11 keep Mr. Jenab and Mr. Peduzzi. You are going to have the
12 delightful task of sitting separately, not discussing the
13 case, during the jury deliberations.

14 But Ms. Jackson and Ms. Hodges, with the thanks of
15 the Court and the parties, you are excused. You can go back.
16 Ilene will take you back to the jury room to gather up your
17 stuff and have a good day and thank you again.

18 (The two alternates are excused and leave the
19 courtroom.)

20 THE COURT: Ilene, we are going to need a place, I
21 should have mentioned this to you earlier, to accommodate
22 Mr. Jenab and Mr. Peduzzi.

23 THE CLERK: We have one.

24 THE COURT: You have one? Always a step ahead of
25 me.

1 There is one other just addition. I had mentioned
2 to you, with regard to that affirmative defense as to which
3 Simels bears the burden of proof by a preponderance of the
4 evidence, I had mentioned to you that he is asserting that
5 defense with regard to --

6 MR. SHARGEL: Page 20, Judge.

7 THE COURT: Thanks.

8 With regard to counts one, three, five, six, seven
9 and eight, but Mr. Shargel has asked at side bar, and the
10 government has not objected, to have me instruct you that that
11 defense is both available to him and asserted with regard to
12 all of those first nine counts, both the conspiracy to tamper
13 with witnesses and the attempt to tamper with witnesses counts
14 in two through nine.

15 Okay. So don't limit to it the ones I specified for
16 you during my initial charge.

17 All right. Will the marshal please come forward?

18 THE MARSHAL: Yes, sir.

19 THE COURT: Raise your right hand, sir.

20 (The marshal is duly sworn/affirmed by court.)

21 THE COURT: Here are the verdict sheets. I don't
22 want you to deliberate at any point, I don't want you to
23 deliberate if your excused colleagues are still in the room,
24 of course, and at any point during your deliberations I don't
25 want you deliberating when less than twelve of you are

1953

1 present. Okay?

2 If someone goes off to the restroom, I want you to
3 stop. It is important that all twelve of you deliberate
4 simultaneously.

5 Are our alternates, Mr. Jenab and Mr. Peduzzi, you
6 won't be deliberating at all. I hope you enjoy each other's
7 company because you will be sharing one another's company
8 during the deliberations. We will send you in lunch. I
9 promise, we won't forget about you. I won't be trying some
10 other case three months from now and remember that you are in
11 another jury room. But we need you, just in the unlikely
12 event that you are needed.

13 Okay. So you can return to the jury room and
14 commence your deliberations.

15 Here are the verdict sheets, one for each defendant.

16 (The following occurred in the absence of the jury,
17 as they begin their deliberations, at 11:40 am.)

18 THE COURT: All right.

19 MR. SHARGEL: Your Honor, the jurors, I don't know
20 if you noticed while they were filing out, but they each took
21 their transcript books with them.

22 THE COURT: Let's go get them.

23 Bring the jury back in, please.

24 I am going to tell them -- well, what do you want me
25 to tell them? We may as well deal with this issue now.

1 MR. SHARGEL: Your Honor said earlier in the trial
2 that given the audibility of the recorded conversation made by
3 Selwyn Vaughn, that you were inclined to allow --

4 THE COURT: Come up to side bar.

5 (Jury present.)

6 (Side bar.)

7 THE COURT: I didn't notice. Thank you for bringing
8 it up.

9 We may as well deal with this issue now.

10 You raised at pretrial, and as I mentioned to you
11 during the course of the trial, it occurred to me, not with
12 respect to the MCC tape --

13 MR. SHARGEL: Right.

14 THE COURT: -- but with respect to these other
15 tapes --

16 (In open court.)

17 THE COURT: Everyone can please be seated. We will
18 be right with you.

19 (Side bar.)

20 THE COURT: That the transcripts themselves are
21 sufficiently non-controversial and sufficiently useful that if
22 the jury asks for those transcripts, I am going to send them
23 in with an admonition that, obviously, the tapes are the
24 evidence.

25 I mean, I am perfectly willing to take them back now

1 but I intend to -- I don't want to leave them with the
2 impression that under no circumstances can they have them.

3 MR. SOLANO: Judge, my position is that they not be
4 allowed to take the transcripts in. I've argued during this
5 entire trial that I think it is important, critical for them
6 to understand if Ms. Irving is in any meeting at that
7 particular time, I pointed out many times during
8 cross-examination, that you could hear her heels leaving the
9 room. That's really the only indication at many points of
10 when she is or isn't in the room.

11 So my position is that they can't get any sense of
12 that and I think the best way for them to get a sense of that
13 is to actually listen to the transcripts.

14 I would object to the transcripts going back.

15 THE COURT: I don't think that objection has any
16 merit. I think these jurors, like any other jury, they are
17 not stupid. They listened to your argument. They know that
18 Irving is not in the room. Not for nothing, you could have
19 proposed on the transcript "footsteps" to be on there. I
20 don't think that's a reason to deprive the jury of the
21 transcripts. It doesn't make sense to me.

22 I am going to tell them that -- I am going to tell
23 them to leave them here but if they, like anything else, if
24 they request it I will send it in.

25 But with respect to those I will send it in only

1956

1 with the admonition that the tapes themselves are the
2 evidence. I am going to tell them I am not going to send in
3 the MCC transcripts. Those I will allow them to listen
4 to -- to use them as an aid if they listen to them.

5 MR. SOLANO: I was going to say, would Your Honor
6 also instruct them that if they ever at any point want to
7 listen to the tape, to determine whether or not they could or
8 couldn't hear footsteps, I know it is an obvious request, that
9 they just let us know.

10 THE COURT: I will tell them they can listen to the
11 tape. I am not going to start identifying what purposes they
12 might want to listen to the tape for.

13 Does anybody want to be heard further?

14 MR. SHARGEL: No.

15 MR. D'ALESSANDRO: Your Honor, I understand the
16 arguments that are being made here. I think the jury, the
17 bulk of them took the jury binders and the transcripts back,
18 obviously through that have signalled that they want this
19 back. It seems to me if Your Honor simply identifies for them
20 you have taken that back. We understand that you as jurors
21 want that back. Here is the admonition with regards to those
22 transcripts. Rather than depriving them of it to get a note
23 to send it back to them. We've already sent them out to
24 deliberate and brought them back.

25 THE COURT: I will treat it like any other -- it is

1957

1 not even an item in evidence. It's an aid. But I think it's
2 an important aid that would help structure their
3 deliberations.

4 I am going to tell them if they want it they will
5 ask for it.

6 Anything further?

7 MR. SHARGEL: No, sir.

8 MR. D'ALESSANDRO: No.

9 (In open court.)

10 THE COURT: You probably didn't get a lot of
11 deliberating done since you last were here.

12 The reason I brought you back is I saw you walk
13 off -- I didn't see it. It was brought to my attention that
14 you walked off with the transcript books.

15 Leave them here for now. Like anything else, if you
16 want evidence, just write a note asking for it. If you ask
17 for those, they will be sent back in. I will have some
18 instructions for you if that is the case in that regard. But
19 for now I want to you leave those here. If you would like to
20 have the transcript books for your deliberations, just send me
21 a note that indicates that you want them.

22 Okay?

23 If that is the case, I may as well tell you now, if
24 you do want them and send me such a note, I am going to send
25 in only the transcripts of the conversations recorded through

1958

1 Vaughn, those tape-recorded phone calls and other
2 conversations and only the ones you asked for, and with a
3 reminder that it is the evidence -- I told you this a couple
4 of times during the trial -- the evidence is the tape-recorded
5 conversations, the tapes, not the transcript.

6 If you want the transcripts to assist in your
7 deliberations, you will request them and they will be sent in.
8 But always bear in mind that the evidence is the recording
9 itself and the words that are spoken on the tape and not what
10 is on the transcript.

11 Okay?

12 Now you get to go back in but this time you leave
13 your black books.

14 Thank you, ladies and gentlemen.

15 All rise.

16 THE CLERK: You can take your yellow pads with you.

17 Okay?

18 (The following occurred in the absence of the jury.)

19 THE COURT: Before we recess in the case on trial,
20 they will eat from one to two, which means -- you can be
21 seated in the back, if you want, and in the well, if you
22 want -- which means if I get a note between one and two, we
23 won't deal with it until 2:00 o'clock. So you can be anywhere
24 you want for lunch.

25 If you are not physically present in the courtroom,

1959

1 make sure you are very close and that Ilene knows how to get
2 you.

3 Please put your heads together on the exhibits, so
4 assuming we get a note for all the exhibits, I would like to
5 be able to comply with that note expeditiously. So make sure
6 you agree on what's in evidence and what's not and have your
7 exhibits ready to go into the jury room.

8 If I get a note that can be responded to in a
9 non-controversial way, like if they ask for more pencils, I
10 will just send it in and the next time we meet I will put it
11 on the record.

12 Sometimes we will get notes about exhibits that
13 again don't produce controversy see and I will just ask Ilene
14 to see if you agree on those, and if you do we will comply
15 with the note and put it on the record the next time we
16 convene.

17 All right? Any objections? Any questions?

18 MR. D'ALESSANDRO: No, Your Honor.

19 MR. SHARGEL: No, Your Honor.

20 MR. SOLANO: No, Your Honor.

21 THE COURT: Okay. We are in recess in the case on
22 trial.

23 (Recess taken.)

24 (Continued on next page.)

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1960

1 (The following occurred in the absence of the jury
2 at 12:30 pm.)

3 THE COURT: In the case on trial, we have a note,
4 jury note one.

5 (So marked.)

6 It says: Request judge's instructions.

7 I don't see a good reason not to send them in,
8 except I want to bring them out and give them a strong caution
9 about not losing sight of my admonition to consider the charge
10 as a whole. I don't want them becoming little lawyers with
11 green eyeshades going through this phrase by phrase. I think
12 they should have the charge.

13 MR. SHARGEL: Is that what you intend to tell them,
14 no green eyeshades?

15 THE COURT: I am going to tell them -- no
16 offense -- I don't want them becoming lawyers. I want them to
17 look at this as a whole.

18 The one experience I had in the past with a charge
19 going into the jury room, an experience I had, was I have
20 discovered they were in there really arguing over little
21 phrases in a manner like lawyers, which obviously has had a
22 telling effect on me and my take on this issue.

23 Yes, that's what I am going to tell them.

24 Any objection?

25 MR. D'ALESSANDRO: No, Your Honor.

1 I would just renew -- the change that I had
2 mentioned at the side bar, if it is necessary.

3 THE COURT: I don't think it is necessary. I don't
4 think it matters who they are contracting with.

5 MR. SHARGEL: I agree.

6 THE COURT: All right. Do you want to be heard?

7 MR. SOLANO: No, Your Honor.

8 THE COURT: All right. Bring them in, please,
9 Ilene.

10 THE CLERK: Yes, Your Honor.

11 MR. SHARGEL: Judge, Mr. Simels is not here.

12 THE COURT: Do you know where he is? Can you try to
13 go find him?

14 MR. SHARGEL: I don't think he is far away.

15 THE COURT: Let's wait one minute.

16 (Pause.)

17 MR. LIPTON: He is on his way upstairs from the
18 cafeteria.

19 THE COURT: Thank you.

20 (Pause continues.)

21 THE COURT: Okay. Please seat the jury.

22 THE CLERK: Yes, Your Honor.

23 (Jury present.)

24 THE COURT: Please be seated.

25 We will need the alternates also, please.

1 THE CLERK: Yes, Your Honor.

2 THE COURT: Most of the time I won't bring the
3 alternates in, but on this one, just in the unlikely event one
4 of them joins you, I want them to hear what I have to say on
5 this.

6 (Alternates present.)

7 THE COURT: Okay. Your note asks for my
8 instructions. I could have just sent them in. I will give
9 them to you now. But what I am about to say to you is
10 important enough to me to haul you back out into court and
11 tell it to you.

12 Here are the instructions. You can take them back
13 into the jury room. I wanted to emphasize that what I said to
14 you at the outset of the instructions, and which you will see
15 now in the written instructions, and that is, to consider my
16 instructions to you as a whole. Don't single out any one as
17 alone stating the law.

18 And no one has more respect for lawyers than me.
19 Most of the people in the courtroom are lawyers. I am a
20 lawyer. I love lawyers. But I don't want you to become
21 lawyers. You are jurors. You are finding the facts. I don't
22 want to run even the slightest risk that I will send this in
23 and turn it into a little law school class where you are
24 parsing over the little phrases. Obviously, these are
25 important. You will follow them. But remember your function

1963

1 is to find the facts and don't lose sight of the fact that I
2 want you to consider these instructions as a whole.

3 Okay? So here you go with that strong admonition.

4 Please return to the jury room and resume your
5 deliberations.

6 (The following occurred in the absence of the jury
7 at 12:40 pm.)

8 MR. SHARGEL: Your Honor, just based on human
9 experience, my request is that the jury get twelve copies of
10 that jury charge. Because, otherwise, the person holding the
11 jury charge has a dominant role almost by logical definition
12 because he or she is kind of in charge of what section they
13 are talking about or referring to.

14 THE COURT: Any objection?

15 MR. D'ALESSANDRO: No.

16 THE COURT: All right. No objection, I will do it.
17 It runs the risk that we have twelve lawyers in
18 there.

19 MR. D'ALESSANDRO: I mean, that's --

20 THE COURT: But I think it is six of one, half dozen
21 of another.

22 MR. D'ALESSANDRO: I agree.

23 THE COURT: The risk remains. I will make some more
24 copies and send them in.

25 MR. SHARGEL: Thank you, Judge. (Recess taken.)

1964

1 (The following occurred in the absence of the jury
2 at 12:55 pm.)

3 THE COURT: Please be seated.

4 What's the problem?

5 MR. SHARGEL: I'm sorry to inconvenience you. You
6 did pursuant to my request change the charge.

7 THE COURT: Yes.

8 Here is what propose to do. I will send that in for
9 the one copy they have and attach it to the other copies.

10 MR. SHARGEL: Perfect.

11 THE COURT: All right?

12 Just so the record reflects what we are talking
13 about, the enlargement of the assertion of that truth seeking
14 defense to all of the 1512(b) charges. I will send that in.

15 Fair enough?

16 MR. FODEMAN: No objection.

17 THE COURT: We will send one in now. I will attach
18 the other eleven to the copies that we are making.

19 MR. SHARGEL: Very well.

20 MR. LIPTON: Thank you.

21 MR. SHARGEL: Can we go to lunch five minutes early?

22 THE COURT: You can go to lunch five minutes early.

23 If there is a verdict we will take it without you.

24 This is Court Exhibit 2.

25 (So marked.) (Continued on next page.)

1965

1 (The following occurred in the absence of the jury
2 at 2:45 pm.)

3 THE COURT: I just want to make a record in the case
4 on trial of jury note two, which I told you about before court
5 reporter arrived.

6 It says: All jurors, except one and four, would
7 like to make phone calls and get some fresh air.

8 It's now a quarter to three. A little more than an
9 hour ago I had the jurors taken out to the park all together
10 with a marshal for about 20 minutes.

11 For the last half an hour or so they have been back
12 deliberating.

13 Okay?

14 (Recess taken.)

15 (Continued on next page.)

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1966

1 (The following occurred in the absence of the jury
2 at 4:00 o'clock pm.)

3 MR. SHARGEL: We have resolved any dispute. It's
4 all resolved. We are ready to go. Sorry to bring you down.

5 THE COURT: That's all right.

6 MR. D'ALESSANDRO: We can put on the record what's
7 going back, Your Honor.

8 THE COURT: Sure.

9 MR. D'ALESSANDRO: It's --

10 THE COURT: Let's put on the record the note, which
11 says, need Fed Ex vouchers -- this is jury note three --
12 Fed Ex vouchers for eavesdropping equipment.

13 Photograph of eavesdropping equipment.

14 Communication to and from government pertaining to
15 possession of equipment.

16 (So marked.)

17 THE COURT: Go ahead.

18 MR. D'ALESSANDRO: The Fed Ex vouchers are
19 Government Exhibits 601 and 602.

20 Photograph -- photographs of the equipment are
21 Government Exhibits 116, 117, 118, one 19, 120, 124, 125, 123
22 and Irving 11.

23 The correspondence pertaining to the back and forth
24 are defense exhibits.

25 MR. SHARGEL: Defense Exhibit 308-B, 308-C, 308-D as

1 in David, 308-E and 308-I, redacted as agreed.

2 THE COURT: I am glad I didn't miss that.

3 MR. D'ALESSANDRO: It's nice to see you again,
4 Judge.

5 THE COURT: It would have been a shame to send that
6 in without making that record.

7 Thank you.

8 MR. D'ALESSANDRO: Thank you.

9 (Recess taken.)

10 (Continued on next page.)

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1968

1 (The following occurred in the absence of the jury
2 at 4:15 pm.)

3 THE COURT: Please be seated.

4 You have seen this note, right?

5 MR. D'ALESSANDRO: Yes.

6 MR. SHARGEL: Yes.

7 THE COURT: Jury note four, request Anthony Ricco's
8 address.

9 (So marked.)

10 MR. SHARGEL: I think they mean testimony.

11 THE COURT: So do I.

12 I suggest I write on this and just put, what do you
13 mean by his address? I will send it back in.

14 MR. D'ALESSANDRO: No objection.

15 THE COURT: Surely, they don't mean his address.
16 Should I ask -- maybe I will just put, do you mean his
17 testimony?

18 MR. FODEMAN: That's good.

19 THE COURT: Okay?

20 MR. FODEMAN: Yes.

21 THE COURT: Do you mean his address -- do you mean
22 his testimony?

23 MR. D'ALESSANDRO: No objection.

24 MR. SOLANO: No objection.

25 THE COURT: Are you all right with that?

1969

1 MR. SHARGEL: Yes.

2 THE COURT: If they mean his testimony, do we have
3 this ready so we can send it in?

4 MR. D'ALESSANDRO: No. We will work on it now.

5 THE COURT: Would you do that?

6 MR. D'ALESSANDRO: Absolutely.

7 THE COURT: I'd rather do that than give a reading
8 with feeling of Tony Ricco's testimony.

9 I am also going to put on this, and if you mean his
10 testimony, do you mean all of his testimony.

11 MR. SHARGEL: Judge, I would -- I would object
12 because I think that that is suggestive -- suggesting to them
13 that they choose a portion, may be putting pressure on them to
14 choose a portion. If we are sending it back there and the
15 answer to your note is they want his testimony, I think that
16 literally read that means all of his testimony.

17 THE COURT: All right. Overruled.

18 Do you want to be heard?

19 MR. FODEMAN: No.

20 THE COURT: If they want all of it, they will say
21 yes.

22 And if you mean his testimony, would you like all of
23 his testimony?

24 All right. That will be marked Court Exhibit 3,
25 which is on the same piece of paper as jury note four.

1970

1 (So marked.)

2 MR. SHARGEL: Judge, may I ask how long you intend
3 to keep the jury, what your practice is?

4 THE COURT: My practice is, if we don't see them on
5 this, to send in a note about a quarter to five to tell them
6 if they want I will let them stay late. If they want to go
7 home at five, they can go home at five.

8 MR. SHARGEL: Very well.

9 (Pause.)

10 THE COURT: By the way, is his office address in the
11 record?

12 MR. SHARGEL: No.

13 MR. LIPTON: No.

14 MR. SHARGEL: He just says that he is from Harlem.

15 THE COURT: Is his office address in Harlem?

16 MR. D'ALESSANDRO:

17 MR. BROWNELL: No; Lower Manhattan.

18 (Pause continues.)

19 THE CLERK: We have an answer.

20 THE COURT: All right. Jury note five consists of
21 two notes.

22 One responds to the question I sent in. It says:
23 I apologize for my misstatement. We need Mr. Ricco's
24 testimony.

25 So we will send in his testimony.

1 The second piece of the new note says: Request
2 Simels's testimony in regards to cracking the password on the
3 laptops.

4 (So marked.)

5 MR. D'ALESSANDRO: We will get to work on that.

6 THE COURT: Please do.

7 If I remember correctly, there wasn't a lot of stuff
8 in Ricco's testimony. I don't remember a lot of objections or
9 sidebars.

10 MR. D'ALESSANDRO: There are two sidebars and there
11 is one objection and a motion to strike and I believe another
12 objection.

13 THE COURT: If you have them tagged --

14 MR. SHARGEL: We are just double-checking.

15 MR. D'ALESSANDRO: What I have done is I have taken
16 Post-it notes to cover objections. Where the motion was
17 granted, I removed the side bar. Defense counsel is looking
18 at it, if we are okay to get a copy made.

19 THE COURT: Once you agree on it give it to us, we
20 will go out and blacken out what has to be blackened out and
21 make a copy and then we will do the same . This isn't very
22 lengthy. I'm sure the Simels's testimony -- was there any
23 cross on it, on cracking the code?

24 MR. SHARGEL: No.

25 MR. D'ALESSANDRO: I don't believe so.

1 THE COURT: That should be pretty easy.

2 (Pause.)

3 MR. D'ALESSANDRO: If you can run it through copier
4 with the Post-it notes there. I put Post-it notes where there
5 are objections and motions to strike. It can go through the
6 copier.

7 THE COURT: I will do it.

8 THE CLERK: Okay, judge.

9 THE COURT: Would one of you hang around to get the
10 other stuff and bring it up?

11 THE LAW CLERK: Yes, Your Honor.

12 (Recess taken.)

13 (After recess.)

14 (The following occurred in the absence of the jury.)

15 THE COURT: Okay. Please be seated.

16 There is some dispute?

17 MR. FODEMAN: Yes, Judge.

18 We have agreement with respect to certain portions
19 of the transcript, but with respect to one section, the
20 government's view is that a certain paragraph is nonresponsive
21 to the note. The note asks for, as I recall it -- I don't
22 have it in front of me exactly. Here. I will read it. All
23 Simels's testimony in regards to cracking the passwords on the
24 laptops.

25 On page 1312, at the very bottom --

1 MR. SHARGEL: Line 25.

2 MR. FODEMAN: Line 25 starts the question.

3 THE COURT: This is what you disagree about?

4 MR. SHARGEL: Yes.

5 MR. FODEMAN: This is the -- yes, this is the
6 section.

7 THE COURT: You think it shouldn't go in and
8 Mr. Simels thinks it should?

9 MR. FODEMAN: Yes.

10 We are in agreement that the question starting on
11 line 25 --

12 MR. SHARGEL: On the next page, very simply, whether
13 its line ten or line seventeen. That's the dispute.

14 MR. FODEMAN: Right, where it should end.

15 (Pause.)

16 THE COURT: We will send in the whole answer.

17 MR. FODEMAN: Okay.

18 THE COURT: What else?

19 MR. SHARGEL: That's it.

20 MR. FODEMAN: Everything else we are in agreement.

21 THE COURT: Do we have something I could copy?

22 MR. FODEMAN: Yes.

23 MR. SHARGEL: There is no side bar?

24 MR. FODEMAN: There are sections --

25 MR. D'ALESSANDRO: One second. We need to put

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1 Post-it notes on the part that needs to be redacted.

2 THE COURT: Okay. There is something you want to
3 add to this, Mr. Solano?

4 MR. SOLANO: Absolutely not.

5 MR. SHARGEL: Are we going to wait to hear from
6 them?

7 THE COURT: I will send in this note, unless someone
8 talks me out of it. It says: Ladies and gentlemen, would you
9 prefer to leave at 5:00 or to deliberate some more after 5:00
10 o'clock? The choice is yours. But please let us know.

11 In no event am I going to let them stay past 5:30,
12 5:45.

13 But that's what I intend to send in. Sometimes if
14 they are working on a particular area, it is helpful to them
15 to stick around a little longer.

16 MR. SHARGEL: That's fine.

17 THE COURT: Any objection?

18 MR. FODEMAN: No, Judge.

19 THE COURT: Mr. Solano?

20 MR. SOLANO: Yes.

21 THE COURT: Any objection?

22 MR. SOLANO: No, Your Honor.

23 (Court Exhibit 4 is marked.)

24 THE COURT: I've already sent in on the way back
25 down two copies of Ricco's testimony. It's not that long, so

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1 I thought I'd make one more.

2 (Pause.)

3 THE COURT: Jury note six says: We prefer to leave
4 at 5:00 o'clock.

5 (So marked.)

6 THE COURT: All right. We will go -- there are like
7 four pounds of Post-its on these. I will send you a bill if
8 you break my copy machine. I will copy these and send them
9 in.

10 Here is what I am going to do. If we hear nothing
11 from them before five, I am just going to, unless you persuade
12 me otherwise, have Ilene go in, tell them to go home, don't
13 discuss the case, be back by 9:30. Tell them, remind them not
14 to deliberate unless all 12, until all 12 are present and just
15 send them home.

16 Anybody object to that?

17 MR. SHARGEL: No disrespect to Ilene intended, but I
18 would prefer that Your Honor did it.

19 THE COURT: Fine.

20 In here?

21 MR. SHARGEL: No, inside.

22 THE COURT: I will do it inside.

23 MR. SHARGEL: In the jury room.

24 THE COURT: I will do it inside.

25 Any objection?

1976

1 MR. D'ALESSANDRO: No, Judge.

2 THE COURT: All right. That's what we will do.

3 Unless you hear from me before five, I will see you
4 then or if not tomorrow.

5 If the clock strikes five and you haven't heard from
6 anyone, feel free to leave.

7 MR. SHARGEL: Thank you.

8 THE COURT: We are in a very delicate stage. Just,
9 everyone, avoid any accidental contact with the jurors. Why
10 don't you not leave precisely at five. Give it a few minutes
11 so they are out the door.

12 MR. SHARGEL: Fine.

13 THE COURT: All right.

14 MR. D'ALESSANDRO: Great.

15 THE COURT: Thank you, everyone.

16 (Recess taken until 9:30, August 12, 2009.)

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E X H I B I T S

C O U R T E X H I B I T S:

jury note one	1960
Court Exhibit 2	1964
jury note two	1965
jury note three	1966
jury note four	1968
Court Exhibit 3	1969
jury note five	1970
Court Exhibit 4	1974
jury note six	1975

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\$	20 [2] - 1952:6, 1965:10 2002 [1] - 1929:20 2006 [2] - 1875:11, 1920:14 2007 [4] - 1875:10, 1934:5, 1934:9, 1940:11 2008 [22] - 1875:10, 1920:14, 1928:10, 1930:5, 1930:6, 1930:8, 1930:11, 1930:12, 1931:15, 1931:16, 1932:5, 1933:14, 1934:6, 1934:10, 1934:25, 1935:1, 1938:13, 1938:14, 1939:7, 1940:11 2009 [2] - 1870:6, 1976:16 202 [1] - 1874:11 208 [1] - 1892:12 20th [1] - 1890:17 225 [1] - 1870:22 25 [3] - 1973:1, 1973:2, 1973:11 2500 [1] - 1898:15 27 [1] - 1939:7 2:00 [1] - 1958:23 2:45 [1] - 1965:2	7
\$10,000 [1] - 1895:23 \$2500 [1] - 1898:11 \$40 [1] - 1898:16 \$5,000 [1] - 1898:13		718 [1] - 1870:23
0		8
08-CR-640 [1] - 1870:3		810 [1] - 1874:22
1		9
10 [1] - 1897:12 100 [1] - 1903:20 10th [1] - 1874:17 11 [2] - 1870:6, 1966:22 11201 [1] - 1870:23 116 [1] - 1966:21 117 [1] - 1966:21 118 [1] - 1966:21 11:40 [1] - 1953:17 11th [1] - 1893:4 12 [4] - 1872:11, 1975:14, 1976:16 120 [1] - 1966:21 123 [1] - 1966:21 124 [1] - 1966:21 125 [1] - 1966:21 12:30 [1] - 1960:2 12:40 [1] - 1963:7 12:55 [1] - 1964:2 13 [1] - 1872:11 1312 [1] - 1972:25 13th [5] - 1874:4, 1875:8, 1876:19, 1889:21, 1893:4 14 [1] - 1904:5 15 [2] - 1894:16, 1895:4 1512 [1] - 1949:24 1512(b) [2] - 1949:24, 1964:14 1512(e) [1] - 1949:3 16th [1] - 1874:13 17th [1] - 1875:21 19 [1] - 1966:21 1960 [1] - 1977:5 1964 [1] - 1977:6 1965 [1] - 1977:7 1966 [1] - 1977:8 1968 [1] - 1977:9 1969 [1] - 1977:10 1970 [1] - 1977:11 1974 [1] - 1977:12 1975 [1] - 1977:13 19th [1] - 1874:12	3	99 [1] - 1881:9 9:30 [3] - 1870:6, 1975:13, 1976:16
	3	A
	3 [2] - 1969:24, 1977:10 30(d) [2] - 1949:18, 1949:21 308-B [1] - 1966:25 308-C [3] - 1904:3, 1966:25 308-D [1] - 1966:25 308-E [1] - 1967:1 308-I [1] - 1967:1 336 [1] - 1877:21 3500 [2] - 1891:18 36 [2] - 1889:24, 1890:1 3800 [2] - 1882:23, 1894:5	a.m [1] - 1870:6 able [3] - 1878:14, 1886:7, 1959:5 absence [10] - 1871:1, 1953:16, 1958:18, 1960:1, 1963:6, 1964:1, 1965:1, 1966:1, 1968:1, 1972:14 absolute [1] - 1888:10 absolutely [2] - 1969:6, 1974:4 absurd [1] - 1891:22 accept [1] - 1918:18 access [1] - 1943:15 accident [2] - 1918:25, 1919:7 accidental [1] - 1976:9 accommodate [2] - 1872:1, 1951:21 accomplish [2] - 1922:6, 1922:17 accomplished [2] - 1922:4, 1941:9 accomplishment [1] - 1923:13 accordance [1] - 1909:12 according [2] - 1899:10, 1900:9 accountable [1] - 1906:9 accurate [1] - 1879:25 accurately [1] - 1914:21 accusations [1] - 1909:25 achieving [1] - 1924:5 acquiesce [1] - 1945:1 acquired [1] - 1915:18 acquit [1] - 1911:14 act [9] - 1910:25, 1911:3, 1922:6, 1922:17, 1922:25, 1923:7, 1926:12, 1932:12, 1943:25 acted [4] - 1919:1, 1925:1, 1928:17, 1930:16 actions [6] - 1892:1, 1906:10, 1921:14, 1922:13, 1922:15, 1922:24 activities [1] - 1929:19 activity [2] - 1939:24, 1940:4 actor [1] - 1879:11 acts [15] - 1918:24, 1919:4, 1919:5, 1923:20, 1929:8, 1929:10, 1929:11, 1931:5, 1931:22, 1933:3, 1934:16, 1935:8, 1943:23 actual [4] - 1920:23, 1938:23, 1942:14, 1943:1
	4	
	4 [2] - 1974:23, 1977:12 404(b) [1] - 1902:10 41 [1] - 1879:13 435 [1] - 1878:4 4:00 [1] - 1966:2 4:15 [1] - 1968:2	
	5	
	5 [2] - 1899:1, 1899:2 5:00 [3] - 1974:9, 1975:4 5:30 [1] - 1974:11 5:45 [1] - 1974:12	
	6	
2	601 [1] - 1966:19 602 [1] - 1966:19 613-2538 [1] - 1870:23	
2 [2] - 1964:24, 1977:6		

<p>bases [1] - 1943:6</p> <p>basic [2] - 1906:6, 1924:4</p> <p>basis [2] - 1907:15, 1918:5</p> <p>battery [1] - 1904:20</p> <p>bear [3] - 1911:20, 1928:2, 1958:8</p> <p>bearing [1] - 1923:19</p> <p>bears [3] - 1936:20, 1937:2, 1952:3</p> <p>became [3] - 1921:12, 1922:22, 1924:10</p> <p>become [4] - 1906:5, 1917:24, 1918:2, 1962:20</p> <p>becomes [1] - 1945:15</p> <p>becoming [2] - 1960:10, 1960:16</p> <p>BEFORE [1] - 1870:9</p> <p>begin [4] - 1873:23, 1908:18, 1949:19, 1953:17</p> <p>beginning [1] - 1880:13</p> <p>begun [1] - 1913:5</p> <p>behalf [2] - 1880:12, 1927:16</p> <p>behavior [1] - 1936:14</p> <p>belief [5] - 1914:5, 1914:10, 1927:1, 1935:7, 1944:23</p> <p>believability [1] - 1913:25</p> <p>benefit [1] - 1916:7</p> <p>BENTON [1] - 1870:13</p> <p>BERG [1] - 1870:20</p> <p>best [3] - 1888:10, 1888:24, 1955:12</p> <p>better [1] - 1901:25</p> <p>between [17] - 1889:9, 1908:11, 1913:11, 1913:18, 1913:22, 1920:13, 1928:10, 1929:17, 1930:5, 1930:11, 1931:15, 1934:25, 1938:13, 1938:21, 1940:10, 1941:4, 1958:22</p> <p>beyond [33] - 1910:2, 1910:5, 1910:12, 1910:14, 1910:18, 1911:1, 1911:8, 1911:9, 1911:17, 1913:15, 1916:15, 1917:6, 1917:23, 1918:5, 1918:16, 1918:19, 1921:4, 1921:17, 1922:20, 1924:8, 1924:23, 1927:10, 1928:4, 1937:3, 1937:7, 1937:19, 1938:3, 1938:12, 1939:14, 1940:1, 1940:14, 1941:17, 1943:2</p> <p>bias [2] - 1909:16, 1914:23</p> <p>bigamist [1] - 1880:25</p> <p>bill [1] - 1975:7</p> <p>billing [3] - 1891:14, 1891:15, 1898:19</p> <p>binders [2] - 1873:21, 1956:17</p> <p>binding [1] - 1943:24</p> <p>bit [5] - 1872:1, 1882:5, 1886:22, 1900:16, 1921:16</p> <p>black [1] - 1958:13</p> <p>blackberry [2] - 1904:19, 1907:14</p> <p>blacken [1] - 1971:20</p> <p>blackened [1] - 1971:20</p> <p>blackout [2] - 1887:20, 1892:5</p> <p>blame [1] - 1905:18</p> <p>blank [2] - 1879:17, 1879:18</p> <p>blinds [1] - 1913:1</p> <p>blue [3] - 1876:25, 1877:14, 1898:25</p>	<p>body [1] - 1888:19</p> <p>bona [4] - 1926:23, 1926:24, 1927:12, 1927:15</p> <p>book [2] - 1882:2, 1887:6</p> <p>books [4] - 1953:21, 1957:14, 1957:20, 1958:13</p> <p>boss [4] - 1877:3, 1889:23, 1889:25, 1890:2</p> <p>boss's [1] - 1903:18</p> <p>bottom [2] - 1915:13, 1972:25</p> <p>box [1] - 1942:20</p> <p>breach [1] - 1906:10</p> <p>break [2] - 1887:4, 1975:8</p> <p>bribe [24] - 1883:19, 1885:3, 1885:12, 1885:15, 1885:16, 1886:11, 1888:15, 1888:16, 1895:12, 1895:13, 1896:9, 1896:23, 1897:12, 1897:14, 1898:17, 1899:17, 1900:11, 1920:6, 1938:22, 1938:23, 1938:24, 1938:25, 1939:1, 1939:3</p> <p>bribed [1] - 1897:25</p> <p>bribery [4] - 1938:8, 1938:11, 1938:21, 1939:2</p> <p>bribing [2] - 1885:12, 1897:22</p> <p>briefly [2] - 1883:5, 1908:24</p> <p>briefs [1] - 1907:6</p> <p>bright [1] - 1912:22</p> <p>bring [15] - 1873:6, 1881:11, 1888:15, 1895:13, 1895:15, 1904:25, 1909:18, 1946:9, 1946:14, 1953:23, 1960:8, 1961:8, 1962:2, 1966:4, 1972:10</p> <p>bringing [6] - 1894:2, 1899:16, 1903:21, 1904:14, 1905:10, 1954:7</p> <p>Brooklyn [2] - 1870:5, 1870:23</p> <p>brother [2] - 1874:24, 1876:6</p> <p>brought [7] - 1903:16, 1903:17, 1905:2, 1908:1, 1956:24, 1957:12, 1957:13</p> <p>Brownell [1] - 1906:12</p> <p>BROWNELL [3] - 1870:15, 1873:7, 1970:17</p> <p>bug [1] - 1899:20</p> <p>bulk [1] - 1956:17</p> <p>burden [15] - 1898:8, 1898:21, 1910:4, 1917:5, 1917:6, 1928:4, 1936:20, 1936:21, 1936:25, 1937:1, 1937:2, 1938:2, 1938:4, 1952:3</p> <p>Bureau [2] - 1939:11, 1950:14</p> <p>business [2] - 1877:5, 1946:22</p> <p>buy [2] - 1882:16, 1893:8</p> <p>buying [1] - 1883:17</p> <p>BY [1] - 1870:14</p>	<p>1920:7, 1920:20, 1933:13, 1933:18, 1933:22, 1934:2, 1936:12, 1938:9, 1938:15, 1938:17, 1939:4, 1939:5</p> <p>Camacho's [1] - 1886:6</p> <p>CAMPBELL [1] - 1870:13</p> <p>candid [1] - 1914:13</p> <p>candor [1] - 1945:3</p> <p>cannot [5] - 1882:10, 1888:21, 1903:20, 1906:7, 1918:6</p> <p>capable [4] - 1907:8, 1907:24, 1943:7, 1943:10</p> <p>caprice [1] - 1911:5</p> <p>care [3] - 1874:6, 1883:10, 1916:4</p> <p>careful [1] - 1892:14</p> <p>carefully [2] - 1910:23, 1914:2</p> <p>carelessness [1] - 1919:1</p> <p>carried [1] - 1940:18</p> <p>carry [2] - 1926:7, 1945:12</p> <p>case [85] - 1873:22, 1873:23, 1874:10, 1874:20, 1875:17, 1875:19, 1877:10, 1877:20, 1880:4, 1880:5, 1880:10, 1880:25, 1882:19, 1882:21, 1882:23, 1883:1, 1883:20, 1885:7, 1885:22, 1891:25, 1894:5, 1897:19, 1900:21, 1903:6, 1903:23, 1906:1, 1908:22, 1909:3, 1909:10, 1909:14, 1909:20, 1910:6, 1912:1, 1912:2, 1912:16, 1913:16, 1914:23, 1914:24, 1915:4, 1915:20, 1917:3, 1917:19, 1917:20, 1917:21, 1918:4, 1918:20, 1919:3, 1919:22, 1920:21, 1921:9, 1921:10, 1922:11, 1927:9, 1931:3, 1931:8, 1931:21, 1932:11, 1933:2, 1933:6, 1933:20, 1933:23, 1934:12, 1934:15, 1935:6, 1935:11, 1936:24, 1943:14, 1944:6, 1944:9, 1944:15, 1944:17, 1944:18, 1944:25, 1945:13, 1949:9, 1951:6, 1951:13, 1953:10, 1957:18, 1957:23, 1958:19, 1959:21, 1960:3, 1965:3, 1975:13</p> <p>cases [3] - 1916:23, 1922:13, 1927:5</p> <p>cash [2] - 1891:14, 1891:22</p> <p>CAT [1] - 1870:25</p> <p>catalog [1] - 1948:25</p> <p>catch [1] - 1899:13</p> <p>caught [5] - 1888:20, 1893:24, 1893:25, 1895:12, 1897:6</p> <p>caused [1] - 1925:3</p> <p>caution [2] - 1916:4, 1960:8</p> <p>cautious [1] - 1892:17</p> <p>cease [1] - 1910:13</p> <p>cellular [1] - 1941:11</p> <p>certain [5] - 1879:3, 1912:6, 1926:14, 1972:18, 1972:20</p> <p>certainly [1] - 1890:1</p> <p>certainty [1] - 1913:20</p> <p>chain [1] - 1912:18</p> <p>change [3] - 1945:7, 1961:1, 1964:6</p> <p>changed [1] - 1913:5</p> <p>character [2] - 1911:2, 1923:15</p>
C		
<p>Cadman [1] - 1870:22</p> <p>cafeteria [1] - 1961:18</p> <p>Camacho [18] - 1885:25, 1886:11, 1888:15, 1896:20, 1898:12, 1899:12,</p>		

<p>characterized [1] - 1922:9</p> <p>charge [35] - 1872:1, 1872:9, 1872:16, 1902:17, 1907:18, 1907:21, 1908:20, 1910:12, 1910:19, 1911:13, 1911:15, 1919:20, 1920:1, 1921:11, 1923:1, 1928:6, 1928:22, 1936:9, 1938:11, 1940:7, 1941:16, 1948:20, 1948:23, 1949:21, 1950:12, 1950:17, 1952:16, 1960:9, 1960:12, 1960:18, 1963:10, 1963:11, 1963:12, 1964:6</p> <p>Charge [1] - 1938:7</p> <p>charged [33] - 1875:11, 1902:16, 1902:17, 1902:18, 1904:23, 1908:23, 1909:23, 1916:16, 1918:15, 1919:21, 1920:5, 1920:6, 1920:7, 1920:9, 1921:6, 1921:19, 1922:17, 1922:19, 1922:22, 1924:3, 1924:9, 1924:14, 1924:16, 1926:16, 1926:18, 1927:6, 1927:11, 1928:5, 1928:25, 1929:1, 1936:4, 1939:15</p> <p>charges [28] - 1909:24, 1910:1, 1910:2, 1910:8, 1913:17, 1917:22, 1918:20, 1918:23, 1920:2, 1920:13, 1926:19, 1927:7, 1928:9, 1928:24, 1930:3, 1930:7, 1934:4, 1936:24, 1937:7, 1938:3, 1938:7, 1938:8, 1939:7, 1943:18, 1943:19, 1949:5, 1964:14</p> <p>charging [1] - 1909:1</p> <p>Chase [1] - 1881:20</p> <p>check [2] - 1891:19, 1891:21</p> <p>checking [1] - 1971:14</p> <p>Chinaman [2] - 1920:18, 1931:14</p> <p>choice [4] - 1901:23, 1902:3, 1902:4, 1974:10</p> <p>choices [3] - 1902:7, 1905:20, 1906:12</p> <p>choose [5] - 1914:8, 1914:21, 1943:25, 1969:13, 1969:14</p> <p>chooses [1] - 1927:24</p> <p>chose [2] - 1917:12, 1917:13</p> <p>chosen [1] - 1905:16</p> <p>circulated [1] - 1872:8</p> <p>circumstances [7] - 1912:19, 1913:2, 1913:4, 1914:3, 1919:3, 1922:11, 1955:2</p> <p>circumstantial [4] - 1912:18, 1912:21, 1913:6, 1913:12</p> <p>Citibank [1] - 1881:20</p> <p>civilian [1] - 1881:7</p> <p>claim [3] - 1898:9, 1899:22, 1924:13</p> <p>clapping [1] - 1881:14</p> <p>clarified [1] - 1907:20</p> <p>Clark [1] - 1920:17</p> <p>Clarke [20] - 1881:16, 1890:6, 1890:7, 1920:11, 1930:4, 1930:6, 1930:10, 1930:15, 1930:17, 1930:18, 1931:1, 1931:7, 1931:8, 1931:11, 1931:17, 1933:23, 1933:24, 1939:9, 1939:16</p> <p>Clarke's [4] - 1886:7, 1901:10, 1901:14, 1929:19</p>	<p>class [2] - 1888:9, 1962:23</p> <p>classes [1] - 1880:6</p> <p>CLE [2] - 1880:6, 1888:9</p> <p>clear [8] - 1886:20, 1905:11, 1905:13, 1907:8, 1907:11, 1907:16, 1907:18, 1909:2</p> <p>clearly [1] - 1929:10</p> <p>CLERK [9] - 1948:3, 1951:23, 1958:16, 1961:10, 1961:22, 1962:1, 1970:19, 1972:8, 1972:11</p> <p>client [23] - 1874:5, 1875:20, 1875:25, 1876:4, 1876:11, 1878:11, 1880:19, 1881:24, 1881:25, 1882:4, 1883:13, 1898:20, 1899:11, 1900:22, 1901:3, 1901:9, 1901:13, 1905:7, 1905:23, 1926:23, 1927:18, 1943:16</p> <p>clients [1] - 1876:3</p> <p>clock [1] - 1976:5</p> <p>close [2] - 1898:11, 1959:1</p> <p>closing [1] - 1912:9</p> <p>coached [1] - 1902:1</p> <p>coaching [3] - 1884:25, 1893:21, 1902:13</p> <p>code [1] - 1971:23</p> <p>coincidence [3] - 1898:13, 1900:13, 1900:14</p> <p>cold [2] - 1889:7, 1889:17</p> <p>colleagues [1] - 1952:23</p> <p>collect [1] - 1897:2</p> <p>color [1] - 1916:11</p> <p>coming [4] - 1894:6, 1894:18, 1900:4, 1912:23</p> <p>commence [3] - 1908:16, 1943:21, 1953:14</p> <p>commerce [4] - 1940:19, 1941:4, 1942:9</p> <p>commission [2] - 1929:8, 1929:12</p> <p>commit [16] - 1902:4, 1906:6, 1921:1, 1921:2, 1921:19, 1923:4, 1924:7, 1924:14, 1924:18, 1924:21, 1926:17, 1926:18, 1929:2, 1929:6, 1929:9, 1929:11</p> <p>commits [1] - 1906:7</p> <p>committed [2] - 1916:16, 1923:5</p> <p>committing [1] - 1929:5</p> <p>common [5] - 1910:21, 1913:10, 1921:23, 1922:7, 1922:16</p> <p>communicate [3] - 1945:16, 1945:18, 1945:19</p> <p>communication [2] - 1941:10, 1966:14</p> <p>communications [5] - 1907:25, 1940:23, 1941:10, 1941:25, 1943:8</p> <p>company [3] - 1939:9, 1953:7</p> <p>compared [1] - 1914:17</p> <p>compensate [1] - 1915:25</p> <p>complete [1] - 1909:15</p> <p>completed [1] - 1929:1</p> <p>completely [1] - 1896:18</p> <p>comply [6] - 1903:21, 1904:1,</p>	<p>1904:10, 1946:4, 1959:5, 1959:14</p> <p>computer [3] - 1876:8, 1887:19, 1904:7</p> <p>computers [2] - 1898:3, 1943:6</p> <p>concepts [1] - 1918:21</p> <p>concern [3] - 1884:1, 1917:25, 1940:5</p> <p>concerning [1] - 1911:12</p> <p>conclusion [1] - 1944:6</p> <p>conclusions [2] - 1913:8, 1945:1</p> <p>conduct [12] - 1919:2, 1919:8, 1919:11, 1922:11, 1923:3, 1926:14, 1926:22, 1927:11, 1929:12, 1936:13, 1937:13, 1939:2</p> <p>conduit [1] - 1901:15</p> <p>conference [1] - 1872:10</p> <p>confidential [1] - 1916:13</p> <p>conformity [8] - 1920:21, 1931:2, 1931:20, 1932:10, 1933:1, 1933:19, 1934:14, 1935:6</p> <p>confounded [1] - 1905:6</p> <p>connection [3] - 1928:22, 1929:14, 1940:7</p> <p>conscience [1] - 1944:21</p> <p>conscientious [2] - 1944:23, 1945:10</p> <p>conscious [1] - 1919:6</p> <p>consent [1] - 1941:9</p> <p>consequences [1] - 1901:24</p> <p>consider [15] - 1908:16, 1909:14, 1913:12, 1914:16, 1917:14, 1918:11, 1918:18, 1919:14, 1922:15, 1923:1, 1927:8, 1938:19, 1960:9, 1962:15, 1963:2</p> <p>consideration [6] - 1911:11, 1911:16, 1915:9, 1918:7, 1928:22, 1945:10</p> <p>considered [1] - 1912:7</p> <p>considering [17] - 1894:12, 1921:12, 1922:21, 1924:3, 1924:10, 1927:5, 1927:6, 1927:12, 1928:16, 1938:11, 1938:14, 1938:16, 1940:17, 1940:24, 1941:16, 1941:18, 1942:3</p> <p>consist [1] - 1929:6</p> <p>consisted [1] - 1912:3</p> <p>consistent [1] - 1914:18</p> <p>consisting [1] - 1926:25</p> <p>consists [1] - 1970:20</p> <p>consolation [1] - 1885:8</p> <p>conspiracy [34] - 1875:11, 1920:1, 1920:12, 1920:24, 1920:25, 1921:3, 1921:6, 1921:7, 1921:11, 1921:13, 1921:20, 1922:8, 1922:10, 1922:13, 1922:18, 1922:19, 1922:22, 1922:24, 1923:1, 1923:4, 1923:8, 1923:12, 1923:13, 1923:15, 1923:19, 1923:20, 1923:25, 1924:1, 1924:3, 1924:5, 1927:6, 1936:8, 1952:12</p> <p>conspirator [1] - 1923:9</p> <p>conspirators [5] - 1921:2, 1922:2, 1922:5, 1923:21, 1924:17</p> <p>conspire [2] - 1921:20, 1924:7</p> <p>conspired [1] - 1920:17</p>
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<p>conspiring [5] - 1902:20, 1919:22, 1920:13, 1924:14, 1926:17</p> <p>constitute [2] - 1927:12, 1929:9</p> <p>Constitution [1] - 1917:3</p> <p>constructive [5] - 1942:16, 1942:21, 1942:22, 1942:23, 1943:1</p> <p>consult [1] - 1944:17</p> <p>consulting [2] - 1945:20, 1945:21</p> <p>contact [5] - 1874:18, 1931:6, 1932:13, 1976:9</p> <p>contends [1] - 1929:21</p> <p>context [6] - 1890:15, 1922:12, 1923:1, 1937:4, 1937:21</p> <p>continue [1] - 1928:1</p> <p>Continued [7] - 1895:25, 1935:13, 1950:24, 1959:24, 1964:25, 1965:15, 1967:10</p> <p>continued [2] - 1925:5, 1947:3</p> <p>continues [2] - 1961:20, 1970:18</p> <p>continuing [1] - 1926:1</p> <p>contract [2] - 1939:10, 1950:14</p> <p>contracting [1] - 1961:4</p> <p>contradictions [1] - 1914:19</p> <p>contrary [1] - 1916:22</p> <p>control [1] - 1942:18</p> <p>controversial [2] - 1954:21, 1959:9</p> <p>controversy [1] - 1959:13</p> <p>convene [1] - 1959:16</p> <p>conversation [3] - 1887:16, 1903:1, 1954:2</p> <p>conversations [5] - 1896:2, 1901:9, 1957:25, 1958:2, 1958:5</p> <p>convey [1] - 1887:1</p> <p>conveys [1] - 1901:15</p> <p>convict [2] - 1911:10, 1911:18</p> <p>convicted [3] - 1903:20, 1913:14, 1918:8</p> <p>conviction [1] - 1907:15</p> <p>convince [5] - 1882:7, 1883:6, 1883:7, 1921:22, 1926:13</p> <p>convinced [2] - 1910:18, 1945:8</p> <p>convincing [1] - 1911:2</p> <p>cooperating [1] - 1884:13</p> <p>cooperator [1] - 1881:13</p> <p>copier [2] - 1972:3, 1972:6</p> <p>copies [5] - 1963:9, 1963:24, 1964:9, 1964:18, 1974:25</p> <p>copy [6] - 1964:9, 1971:18, 1971:21, 1973:21, 1975:8</p> <p>correct [2] - 1934:7, 1950:18</p> <p>corrected [1] - 1950:15</p> <p>corrections [1] - 1884:11</p> <p>correctly [1] - 1971:7</p> <p>correspondence [1] - 1966:23</p> <p>corrupt [1] - 1919:23</p> <p>corruptly [10] - 1872:3, 1920:17, 1921:8, 1924:25, 1926:12, 1928:14, 1928:20, 1929:25, 1930:14, 1930:21</p> <p>costs [1] - 1905:21</p>	<p>counsel [13] - 1873:25, 1882:13, 1901:2, 1906:17, 1908:6, 1908:12, 1915:11, 1917:18, 1927:19, 1945:20, 1945:21, 1947:1, 1971:17</p> <p>Count [29] - 1872:2, 1872:4, 1872:6, 1907:25, 1908:1, 1920:12, 1924:16, 1926:16, 1926:20, 1927:6, 1927:25, 1928:9, 1929:2, 1929:15, 1930:3, 1930:10, 1931:12, 1931:17, 1932:3, 1932:19, 1933:12, 1934:3, 1934:23, 1936:3, 1936:8, 1936:9, 1936:10, 1938:7</p> <p>count [13] - 1919:16, 1927:25, 1928:23, 1932:23, 1936:4, 1938:20, 1939:6, 1939:14, 1940:10, 1941:12, 1946:23, 1950:1</p> <p>country [2] - 1888:2, 1908:1</p> <p>counts [21] - 1872:4, 1872:5, 1919:13, 1919:17, 1920:5, 1926:17, 1928:2, 1928:6, 1928:7, 1932:6, 1933:15, 1934:11, 1934:24, 1935:2, 1937:10, 1940:9, 1943:4, 1943:7, 1952:8, 1952:12, 1952:13</p> <p>Counts [4] - 1872:11, 1924:18, 1927:14, 1938:3</p> <p>couple [2] - 1951:2, 1958:3</p> <p>course [18] - 1873:20, 1878:8, 1880:9, 1883:8, 1887:6, 1889:1, 1890:5, 1908:12, 1909:5, 1909:6, 1912:11, 1916:20, 1917:1, 1917:9, 1929:12, 1944:22, 1952:24, 1954:11</p> <p>COURT [123] - 1870:1, 1871:2, 1871:5, 1871:8, 1871:25, 1872:15, 1872:23, 1873:2, 1873:6, 1873:9, 1873:16, 1903:8, 1903:10, 1906:16, 1906:19, 1906:25, 1907:21, 1908:3, 1908:5, 1926:1, 1934:9, 1936:1, 1948:2, 1948:6, 1948:14, 1948:19, 1949:22, 1949:24, 1950:2, 1950:4, 1950:9, 1950:21, 1950:23, 1951:2, 1951:20, 1951:24, 1952:7, 1952:19, 1952:21, 1953:18, 1953:22, 1954:4, 1954:7, 1954:14, 1954:17, 1954:20, 1955:15, 1956:10, 1956:25, 1957:10, 1958:19, 1959:21, 1960:3, 1960:15, 1961:3, 1961:6, 1961:8, 1961:12, 1961:15, 1961:19, 1961:21, 1961:24, 1962:2, 1962:7, 1963:14, 1963:16, 1963:20, 1963:23, 1964:3, 1964:7, 1964:11, 1964:17, 1964:22, 1965:3, 1966:5, 1966:8, 1966:10, 1966:17, 1967:2, 1967:5, 1968:3, 1968:7, 1968:11, 1968:15, 1968:19, 1968:21, 1968:25, 1969:2, 1969:5, 1969:7, 1969:17, 1969:20, 1970:4, 1970:10, 1970:15, 1970:20, 1971:6, 1971:13, 1971:19, 1972:1, 1972:7, 1972:9, 1972:15, 1973:3, 1973:7, 1973:16, 1973:18, 1973:21, 1974:2, 1974:7, 1974:17, 1974:19, 1974:21, 1974:24, 1975:3,</p>	<p>1975:6, 1975:19, 1975:22, 1975:24, 1976:2, 1976:8, 1976:13, 1976:15</p> <p>Court [12] - 1870:22, 1872:21, 1918:3, 1945:9, 1951:5, 1951:15, 1964:24, 1969:24, 1974:23, 1977:6, 1977:10, 1977:12</p> <p>court [15] - 1894:10, 1908:4, 1909:18, 1912:22, 1927:22, 1945:20, 1946:10, 1946:15, 1948:5, 1951:1, 1952:20, 1954:16, 1957:9, 1962:10, 1965:4</p> <p>Courthouse [1] - 1870:4</p> <p>courtroom [7] - 1871:13, 1871:18, 1912:23, 1913:4, 1951:19, 1958:25, 1962:19</p> <p>cousin [2] - 1876:21, 1877:2</p> <p>cover [2] - 1898:2, 1971:16</p> <p>covered [1] - 1897:22</p> <p>cracking [3] - 1971:2, 1971:23, 1972:23</p> <p>crazy [3] - 1892:8, 1893:2, 1893:7</p> <p>credibility [4] - 1909:8, 1913:25, 1914:11, 1915:12</p> <p>credit [1] - 1915:14</p> <p>crime [30] - 1897:3, 1904:24, 1913:14, 1916:16, 1921:1, 1921:2, 1921:3, 1921:19, 1923:4, 1923:5, 1923:6, 1924:8, 1924:12, 1924:17, 1924:20, 1924:22, 1926:15, 1927:11, 1928:5, 1929:1, 1929:2, 1929:4, 1929:5, 1929:6, 1929:9, 1929:11, 1929:13, 1931:16, 1935:2, 1940:14</p> <p>crimes [8] - 1902:4, 1906:6, 1906:7, 1908:23, 1924:16, 1929:19, 1938:2, 1938:5</p> <p>criminal [9] - 1876:17, 1910:6, 1920:24, 1921:13, 1921:24, 1922:23, 1923:3, 1927:5, 1943:14</p> <p>criminals [2] - 1906:4, 1906:5</p> <p>critical [1] - 1955:5</p> <p>cross [7] - 1889:14, 1890:12, 1912:4, 1914:17, 1915:1, 1955:8, 1971:23</p> <p>cross-examination [2] - 1915:1, 1955:8</p> <p>cross-examinations [1] - 1912:4</p> <p>crowd [1] - 1902:6</p> <p>crystal [1] - 1886:20</p> <p>culminate [1] - 1929:12</p> <p>culprit [1] - 1876:13</p> <p>curry [1] - 1916:3</p>
D		
		<p>D'Alessandro [2] - 1877:21, 1906:12</p> <p>D'ALESSANDRO [35] - 1870:14, 1871:4, 1871:7, 1871:10, 1871:22, 1934:7, 1950:6, 1950:10, 1950:22, 1956:15, 1957:8, 1959:18, 1960:25, 1963:15, 1963:19, 1963:22, 1966:6, 1966:9, 1966:18, 1967:3, 1967:8,</p>

<p>1968:5, 1968:14, 1968:23, 1969:4, 1969:6, 1970:16, 1971:5, 1971:10, 1971:15, 1971:25, 1972:3, 1973:25, 1976:1, 1976:14</p> <p>damn [1] - 1883:11</p> <p>Dancing [1] - 1874:21</p> <p>danger [1] - 1926:9</p> <p>DANIEL [1] - 1870:15</p> <p>date [2] - 1874:12, 1913:20</p> <p>dates [5] - 1913:17, 1913:18, 1913:19, 1913:22</p> <p>David [10] - 1886:6, 1920:11, 1920:17, 1929:19, 1930:4, 1930:6, 1930:14, 1939:9, 1939:16, 1967:1</p> <p>dawned [1] - 1892:8</p> <p>days [5] - 1874:13, 1892:8, 1893:4, 1899:2, 1899:14</p> <p>dead [1] - 1884:14</p> <p>deal [5] - 1877:10, 1890:19, 1953:25, 1954:9, 1958:23</p> <p>dealer [1] - 1876:20</p> <p>dealing [5] - 1874:16, 1875:9, 1877:2, 1896:1, 1927:3</p> <p>dealt [1] - 1890:20</p> <p>Deb [8] - 1891:18, 1891:20, 1891:21, 1897:13, 1901:8, 1901:9, 1901:11, 1903:3</p> <p>decide [5] - 1903:6, 1909:3, 1916:5, 1944:25</p> <p>decided [2] - 1905:21, 1906:5</p> <p>decision [4] - 1901:23, 1915:13, 1939:24</p> <p>decisions [5] - 1882:15, 1901:24, 1914:11, 1914:12, 1940:3</p> <p>defend [2] - 1906:4, 1943:13</p> <p>defendant [69] - 1874:9, 1886:14, 1886:19, 1898:7, 1899:23, 1910:6, 1910:8, 1910:9, 1910:11, 1910:14, 1910:16, 1911:13, 1911:14, 1911:22, 1911:23, 1913:13, 1916:16, 1917:2, 1917:3, 1917:6, 1917:8, 1917:24, 1918:8, 1919:1, 1919:8, 1919:10, 1919:11, 1919:15, 1919:17, 1919:19, 1919:20, 1921:12, 1922:21, 1923:10, 1923:14, 1923:22, 1924:2, 1924:10, 1924:24, 1925:1, 1926:7, 1927:12, 1927:23, 1928:2, 1928:14, 1928:16, 1929:4, 1930:13, 1930:16, 1936:5, 1936:20, 1936:25, 1938:10, 1938:14, 1938:16, 1938:20, 1938:24, 1939:6, 1939:13, 1940:13, 1940:17, 1940:24, 1941:15, 1941:17, 1942:3, 1942:8, 1953:15</p> <p>defendant's [12] - 1872:16, 1877:7, 1880:8, 1886:7, 1899:21, 1910:18, 1911:17, 1913:15, 1919:5, 1920:21, 1923:18, 1939:2</p> <p>Defendants [2] - 1870:6, 1870:17</p> <p>defendants [41] - 1874:19, 1880:12, 1882:19, 1882:25, 1883:1, 1884:24,</p>	<p>1885:18, 1886:21, 1888:25, 1905:4, 1905:24, 1906:3, 1906:9, 1909:17, 1909:21, 1909:22, 1909:25, 1910:4, 1910:6, 1911:19, 1914:25, 1915:24, 1917:20, 1917:22, 1918:4, 1919:21, 1920:3, 1920:6, 1920:13, 1920:16, 1924:21, 1926:16, 1927:5, 1928:9, 1928:25, 1930:6, 1935:1, 1938:8, 1940:11, 1940:16, 1941:13</p> <p>defending [1] - 1949:7</p> <p>defense [42] - 1873:3, 1882:6, 1882:13, 1883:4, 1885:15, 1889:7, 1889:12, 1892:12, 1900:17, 1903:13, 1915:11, 1927:24, 1928:3, 1931:2, 1931:20, 1932:1, 1932:11, 1932:15, 1933:1, 1933:6, 1933:19, 1933:23, 1934:15, 1934:19, 1935:6, 1936:18, 1936:19, 1936:20, 1937:5, 1937:10, 1937:12, 1938:1, 1949:3, 1949:9, 1949:25, 1952:2, 1952:5, 1952:11, 1964:14, 1966:24, 1966:25, 1971:17</p> <p>deference [1] - 1945:5</p> <p>define [1] - 1910:20</p> <p>defined [1] - 1938:4</p> <p>definition [1] - 1963:11</p> <p>definitions [1] - 1930:23</p> <p>degree [1] - 1945:4</p> <p>deliberate [6] - 1952:22, 1952:23, 1953:3, 1956:24, 1974:9, 1975:14</p> <p>deliberately [1] - 1919:5</p> <p>deliberating [4] - 1952:25, 1953:6, 1957:11, 1965:12</p> <p>deliberation [1] - 1945:11</p> <p>deliberations [30] - 1908:16, 1908:25, 1910:10, 1912:13, 1916:14, 1917:15, 1917:17, 1918:1, 1918:10, 1930:24, 1943:21, 1943:22, 1944:22, 1945:7, 1945:15, 1945:24, 1946:20, 1946:21, 1949:19, 1951:4, 1951:10, 1951:13, 1952:24, 1953:8, 1953:14, 1953:17, 1957:3, 1957:20, 1958:7, 1963:5</p> <p>delicate [1] - 1976:8</p> <p>delightful [1] - 1951:12</p> <p>demonstrates [1] - 1951:6</p> <p>denied [2] - 1872:10, 1908:3</p> <p>deny [2] - 1888:21</p> <p>Department [1] - 1939:11</p> <p>deposit [1] - 1942:20</p> <p>deprive [1] - 1955:20</p> <p>depriving [1] - 1956:22</p> <p>describe [3] - 1889:23, 1890:1, 1924:17</p> <p>described [2] - 1872:3, 1934:11</p> <p>describes [1] - 1924:20</p> <p>deserve [1] - 1915:21</p> <p>deserves [1] - 1914:1</p> <p>deserving [1] - 1915:8</p> <p>design [7] - 1904:22, 1922:7, 1922:16, 1940:21, 1941:1, 1941:23, 1942:4</p> <p>designed [5] - 1904:19, 1904:21,</p>	<p>1904:25, 1905:1</p> <p>desk [1] - 1884:19</p> <p>desperately [1] - 1872:19</p> <p>detailed [2] - 1898:6, 1898:19</p> <p>details [1] - 1923:25</p> <p>detention [2] - 1939:10, 1940:8</p> <p>determination [1] - 1916:18</p> <p>determine [2] - 1918:4, 1956:7</p> <p>determined [1] - 1911:22</p> <p>determining [3] - 1909:13, 1922:14, 1927:9</p> <p>deterring [1] - 1926:3</p> <p>devastating [2] - 1889:16, 1889:17</p> <p>device [11] - 1940:19, 1940:21, 1940:25, 1941:1, 1941:6, 1941:7, 1941:20, 1941:23, 1942:4, 1942:8</p> <p>devising [1] - 1929:7</p> <p>difference [1] - 1908:11</p> <p>different [5] - 1881:17, 1889:2, 1897:19, 1923:21, 1937:18</p> <p>difficult [1] - 1892:16</p> <p>direct [6] - 1912:3, 1912:16, 1913:2, 1913:11, 1914:16, 1922:9</p> <p>directed [1] - 1899:4</p> <p>directing [1] - 1881:5</p> <p>dirt [1] - 1880:21</p> <p>dirty [1] - 1884:8</p> <p>disagree [1] - 1973:3</p> <p>discharge [1] - 1916:24</p> <p>discovered [1] - 1960:20</p> <p>discovery [2] - 1903:22, 1903:25</p> <p>discredit [1] - 1880:22</p> <p>discuss [6] - 1917:16, 1918:22, 1944:15, 1944:17, 1945:6, 1975:13</p> <p>discussed [2] - 1898:6, 1900:22</p> <p>discussing [2] - 1928:24, 1951:12</p> <p>discussion [2] - 1878:10, 1878:13</p> <p>displayed [1] - 1880:8</p> <p>disposal [1] - 1891:25</p> <p>dispute [3] - 1966:3, 1972:16, 1973:13</p> <p>disputes [1] - 1909:18</p> <p>disputing [1] - 1880:14</p> <p>disregard [2] - 1914:7, 1914:9</p> <p>disregarded [1] - 1912:12</p> <p>disrespect [1] - 1975:17</p> <p>dissuade [4] - 1931:8, 1932:15, 1933:24, 1934:20</p> <p>dissuading [1] - 1949:11</p> <p>distinct [2] - 1921:1, 1923:20</p> <p>distinction [2] - 1913:11, 1938:21</p> <p>distracted [1] - 1894:16</p> <p>DISTRICT [3] - 1870:1, 1870:1, 1870:10</p> <p>document [1] - 1898:1</p> <p>documents [1] - 1898:3</p> <p>dollars [4] - 1890:18, 1891:11, 1891:14, 1891:16</p> <p>dominant [1] - 1963:11</p> <p>dominion [1] - 1942:18</p>
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<p>done [9] - 1883:22, 1885:5, 1889:3, 1896:7, 1901:19, 1909:5, 1927:25, 1957:11, 1971:15</p> <p>donuts [1] - 1884:19</p> <p>door [1] - 1976:11</p> <p>doors [1] - 1912:24</p> <p>double [1] - 1971:14</p> <p>double-checking [1] - 1971:14</p> <p>doubt [43] - 1880:15, 1882:20, 1910:3, 1910:5, 1910:12, 1910:14, 1910:18, 1910:20, 1910:21, 1910:22, 1910:24, 1911:1, 1911:4, 1911:5, 1911:6, 1911:9, 1911:14, 1911:17, 1913:15, 1916:15, 1917:6, 1917:23, 1918:5, 1918:16, 1918:19, 1921:4, 1921:18, 1922:21, 1924:9, 1924:23, 1927:10, 1928:4, 1937:3, 1937:7, 1937:19, 1938:4, 1938:13, 1939:14, 1940:1, 1940:14, 1941:17, 1943:2</p> <p>doubting [1] - 1882:24</p> <p>down [17] - 1871:15, 1872:20, 1873:19, 1875:16, 1881:16, 1887:4, 1888:1, 1894:2, 1894:9, 1896:3, 1897:8, 1899:19, 1900:13, 1902:11, 1940:10, 1966:4, 1974:25</p> <p>dozen [1] - 1963:20</p> <p>draft [2] - 1872:9, 1933:6</p> <p>drafted [1] - 1892:25</p> <p>draw [3] - 1892:16, 1913:8, 1916:21</p> <p>drawer [1] - 1898:11</p> <p>drawing [1] - 1907:14</p> <p>drawn [1] - 1917:13</p> <p>drive [2] - 1877:9</p> <p>drive-by [2] - 1877:9</p> <p>driving [2] - 1890:7, 1892:6</p> <p>dropped [1] - 1949:1</p> <p>drug [6] - 1876:20, 1877:10, 1929:18, 1931:4, 1931:21</p> <p>dry [1] - 1912:22</p> <p>due [1] - 1907:10</p> <p>duly [1] - 1952:20</p> <p>dumb [1] - 1898:11</p> <p>duration [1] - 1924:2</p> <p>during [37] - 1873:20, 1876:19, 1878:1, 1878:10, 1880:9, 1887:6, 1889:1, 1889:13, 1889:14, 1908:10, 1909:6, 1912:11, 1912:13, 1915:6, 1916:1, 1916:19, 1916:20, 1917:15, 1917:16, 1926:21, 1941:13, 1944:22, 1945:7, 1945:15, 1945:24, 1949:8, 1951:3, 1951:10, 1951:13, 1952:16, 1952:24, 1953:8, 1954:11, 1955:4, 1955:7, 1958:4</p> <p>duties [1] - 1927:1</p> <p>duty [6] - 1900:19, 1909:14, 1911:7, 1911:14, 1918:1, 1944:16</p>	<p style="text-align: center;">E</p> <p>e-mails [2] - 1904:20, 1904:21</p> <p>eager [1] - 1901:3</p> <p>ear [1] - 1892:7</p> <p>early [2] - 1964:21, 1964:22</p> <p>easier [1] - 1886:1</p> <p>East [1] - 1870:22</p> <p>EASTERN [1] - 1870:1</p> <p>easy [1] - 1972:1</p> <p>eat [1] - 1958:20</p> <p>eating [1] - 1884:19</p> <p>eavesdropping [6] - 1920:8, 1940:12, 1941:14, 1941:19, 1966:12, 1966:13</p> <p>education [1] - 1915:17</p> <p>effect [3] - 1944:2, 1944:24, 1960:22</p> <p>effort [1] - 1949:7</p> <p>efforts [2] - 1892:14, 1905:24</p> <p>Eight [3] - 1934:3, 1936:12, 1938:3</p> <p>eight [4] - 1920:1, 1920:5, 1935:3, 1952:9</p> <p>either [13] - 1900:18, 1909:16, 1920:20, 1925:2, 1931:1, 1931:19, 1932:10, 1932:25, 1933:18, 1934:14, 1940:13, 1946:8, 1950:20</p> <p>elaborate [1] - 1921:15</p> <p>elapsed [1] - 1889:9</p> <p>electronic [3] - 1940:23, 1941:24, 1943:8</p> <p>element [3] - 1921:11, 1922:18, 1922:20</p> <p>elements [34] - 1872:3, 1908:23, 1918:15, 1918:22, 1921:4, 1921:15, 1921:16, 1924:12, 1924:22, 1926:15, 1927:10, 1928:5, 1928:13, 1930:12, 1931:16, 1931:17, 1932:6, 1932:22, 1932:23, 1933:15, 1934:10, 1935:2, 1937:7, 1938:2, 1938:5, 1938:13, 1939:22, 1940:15, 1941:3, 1943:18</p> <p>elevator [3] - 1871:14, 1871:16, 1871:17</p> <p>elevators [1] - 1871:17</p> <p>eleven [1] - 1964:18</p> <p>Eleven [1] - 1939:6</p> <p>eliciting [1] - 1949:11</p> <p>email [5] - 1874:11, 1875:16, 1875:25, 1892:11, 1893:1</p> <p>emergency [2] - 1948:8, 1948:9</p> <p>emphasize [3] - 1919:13, 1937:25, 1962:13</p> <p>employed [2] - 1915:7, 1915:23</p> <p>employee [1] - 1920:10</p> <p>encourage [2] - 1936:14, 1937:14</p> <p>end [3] - 1874:3, 1892:21, 1973:14</p> <p>enemies [1] - 1931:3</p> <p>enforcement [9] - 1883:25, 1884:3, 1885:7, 1897:15, 1915:5, 1915:7, 1915:10, 1915:12, 1915:15</p> <p>engage [1] - 1926:14</p>	<p>engaged [3] - 1919:12, 1923:16, 1937:13</p> <p>engages [1] - 1919:8</p> <p>enjoy [1] - 1953:6</p> <p>enlargement [1] - 1964:13</p> <p>ensuring [1] - 1949:16</p> <p>enter [3] - 1916:14, 1917:25, 1918:9</p> <p>entered [2] - 1921:5, 1921:18</p> <p>entire [6] - 1878:2, 1878:4, 1914:9, 1924:1, 1949:7, 1955:5</p> <p>entirely [1] - 1912:12</p> <p>entitled [1] - 1944:2</p> <p>entry [1] - 1944:10</p> <p>equal [1] - 1909:18</p> <p>equally [1] - 1937:23</p> <p>equipment [21] - 1903:25, 1904:5, 1904:8, 1904:15, 1904:16, 1904:23, 1905:10, 1907:4, 1907:24, 1920:8, 1940:9, 1940:12, 1941:12, 1941:14, 1941:20, 1943:13, 1943:15, 1966:12, 1966:13, 1966:15, 1966:20</p> <p>error [1] - 1883:7</p> <p>ESQ [4] - 1870:17, 1870:17, 1870:19, 1870:20</p> <p>establish [2] - 1901:3, 1913:20</p> <p>established [2] - 1913:7, 1913:22</p> <p>establishes [2] - 1922:5, 1937:11</p> <p>Europe [2] - 1900:19, 1904:25</p> <p>evaluate [1] - 1915:2</p> <p>EVAN [1] - 1870:17</p> <p>evasive [1] - 1914:15</p> <p>event [6] - 1912:17, 1936:16, 1937:15, 1953:12, 1962:3, 1974:11</p> <p>events [1] - 1917:19</p> <p>evidence [95] - 1873:22, 1874:25, 1875:2, 1875:13, 1875:17, 1880:24, 1884:8, 1885:24, 1886:5, 1886:18, 1886:19, 1886:20, 1889:3, 1889:6, 1889:16, 1891:16, 1897:24, 1897:25, 1898:5, 1898:9, 1898:19, 1903:7, 1903:22, 1903:23, 1906:13, 1908:5, 1908:21, 1909:9, 1909:14, 1909:25, 1910:7, 1910:23, 1911:12, 1911:16, 1911:23, 1912:2, 1912:4, 1912:5, 1912:9, 1912:10, 1912:11, 1912:12, 1912:15, 1912:16, 1912:18, 1912:21, 1913:2, 1913:6, 1913:12, 1913:16, 1913:23, 1914:4, 1915:14, 1915:20, 1917:4, 1918:3, 1918:6, 1918:12, 1919:15, 1927:9, 1936:22, 1937:5, 1937:11, 1937:12, 1937:18, 1937:20, 1937:22, 1937:23, 1938:19, 1944:2, 1944:6, 1944:18, 1944:24, 1945:3, 1945:6, 1945:11, 1946:12, 1946:14, 1952:4, 1954:24, 1956:2, 1957:1, 1957:16, 1958:3, 1958:4, 1958:8, 1959:6</p> <p>evil [1] - 1926:13</p> <p>Ex [3] - 1966:11, 1966:12, 1966:18</p> <p>exact [4] - 1886:15, 1891:18, 1896:22,</p>
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<p>1913:20 exactly [7] - 1875:17, 1878:22, 1878:23, 1898:13, 1900:12, 1904:13, 1972:22 examination [3] - 1914:16, 1915:1, 1955:8 examinations [1] - 1912:4 examine [3] - 1914:2, 1915:2, 1945:2 example [8] - 1912:20, 1929:17, 1931:3, 1931:21, 1935:6, 1942:19, 1949:14 except [4] - 1920:3, 1945:19, 1960:8, 1965:6 exception [1] - 1949:19 exclusively [2] - 1909:4, 1918:2 excuse [5] - 1887:5, 1888:3, 1888:18, 1890:16, 1911:6 excused [4] - 1951:5, 1951:15, 1951:18, 1952:23 excuses [1] - 1889:19 exercise [1] - 1942:17 Exhibit [10] - 1874:11, 1874:22, 1892:12, 1964:24, 1966:25, 1969:24, 1974:23, 1977:6, 1977:10, 1977:12 Exhibits [2] - 1966:19, 1966:21 exhibits [9] - 1873:21, 1912:4, 1946:11, 1946:13, 1959:3, 1959:4, 1959:7, 1959:12, 1966:24 existed [4] - 1922:14, 1922:16, 1924:9, 1936:13 existence [4] - 1912:19, 1918:17, 1922:10, 1922:18 expeditiously [1] - 1959:5 expensive [1] - 1897:8 experience [6] - 1913:9, 1915:18, 1960:18, 1960:19, 1963:9 experiment [1] - 1881:12 expert [4] - 1897:16, 1904:7, 1915:16, 1915:20 expertise [1] - 1915:18 experts [1] - 1915:17 explain [1] - 1924:12 explained [3] - 1922:24, 1930:20, 1942:10 explaining [1] - 1878:10 explanation [2] - 1890:17, 1902:12 explanatory [1] - 1939:22 explicit [1] - 1936:2 express [2] - 1921:25, 1926:5 expressing [2] - 1909:2, 1909:7 expressly [1] - 1907:4 exquisite [2] - 1885:24, 1886:4 extent [1] - 1923:18 eyeshades [2] - 1960:11, 1960:14 eyewitness [3] - 1897:12, 1897:14, 1912:17</p>	<p style="text-align: center;">F</p> <p>face [1] - 1919:17 facility [2] - 1939:10, 1940:8 facing [1] - 1919:20 fact [15] - 1872:1, 1909:13, 1912:20, 1915:7, 1916:22, 1917:11, 1917:16, 1918:17, 1918:19, 1923:6, 1937:25, 1939:23, 1943:10, 1944:10, 1963:1 facts [11] - 1909:3, 1909:8, 1909:10, 1909:11, 1912:6, 1912:15, 1912:20, 1913:7, 1919:2, 1962:21, 1963:1 fails [1] - 1910:14 fair [6] - 1872:23, 1911:11, 1911:15, 1927:2, 1944:6, 1964:15 faith [1] - 1926:25 faithfulness [1] - 1927:1 false [13] - 1895:13, 1914:7, 1914:8, 1920:10, 1931:9, 1932:16, 1933:25, 1934:20, 1939:18, 1939:19, 1940:7, 1949:11 falsely [4] - 1929:16, 1936:16, 1937:15, 1939:7 falsus [1] - 1872:15 family [4] - 1878:17, 1878:18, 1878:20, 1879:16 fantastic [2] - 1881:15, 1886:18 far [2] - 1891:13, 1961:14 Farrah [4] - 1920:20, 1934:24, 1935:5, 1949:12 father [1] - 1879:7 fault [1] - 1902:7 favor [1] - 1916:3 favorite [1] - 1888:10 fear [3] - 1890:7, 1892:6, 1926:3 fearful [1] - 1926:11 Fed [3] - 1966:11, 1966:12, 1966:18 federal [2] - 1894:10, 1909:24 fee [2] - 1896:16, 1897:1 feelings [1] - 1916:12 feet [1] - 1884:19 fellow [1] - 1945:1 few [7] - 1873:24, 1889:20, 1924:18, 1927:8, 1928:12, 1943:20, 1976:10 fide [4] - 1926:23, 1926:24, 1927:13, 1927:15 fifth [1] - 1939:19 filing [1] - 1953:20 fill [1] - 1878:14 filled [1] - 1878:19 filling [2] - 1879:12, 1879:14 Finally [1] - 1898:11 finally [5] - 1874:8, 1898:10, 1899:1, 1903:17 financial [1] - 1916:2 fine [6] - 1891:5, 1897:1, 1974:16, 1975:19, 1976:12 Fine [1] - 1904:17 Fineman [8] - 1893:14, 1895:20,</p>	<p>1896:14, 1896:16, 1900:2, 1900:24, 1902:11, 1902:14 firewall [1] - 1897:20 first [20] - 1874:4, 1879:1, 1883:25, 1884:7, 1884:25, 1895:17, 1897:17, 1900:25, 1921:5, 1921:17, 1922:18, 1924:24, 1928:14, 1938:13, 1939:15, 1940:16, 1941:19, 1951:3, 1952:12 First [1] - 1930:13 five [23] - 1872:22, 1875:5, 1893:16, 1896:11, 1896:21, 1899:2, 1899:14, 1901:25, 1903:9, 1908:19, 1932:23, 1952:8, 1964:21, 1964:22, 1970:5, 1970:7, 1970:20, 1975:11, 1976:3, 1976:5, 1976:10, 1977:11 Five [3] - 1932:3, 1936:10, 1938:3 flash [1] - 1885:19 flatter [2] - 1894:9 flood [1] - 1948:10 focus [8] - 1877:13, 1879:6, 1880:3, 1885:18, 1924:19, 1932:5, 1934:4 focuses [8] - 1930:4, 1930:10, 1931:13, 1931:15, 1932:20, 1932:21, 1933:14, 1934:24 focusing [1] - 1887:19 FODEMAN [24] - 1870:14, 1871:6, 1871:24, 1872:19, 1873:1, 1873:14, 1873:17, 1896:1, 1903:9, 1903:11, 1964:16, 1968:18, 1968:20, 1969:19, 1972:17, 1973:2, 1973:5, 1973:9, 1973:14, 1973:17, 1973:20, 1973:22, 1973:24, 1974:18 Fodeman [4] - 1873:12, 1906:16, 1907:3, 1907:13 follow [2] - 1908:13, 1962:25 following [12] - 1871:1, 1880:18, 1940:15, 1953:16, 1958:18, 1960:1, 1963:6, 1964:1, 1965:1, 1966:1, 1968:1, 1972:14 footsteps [3] - 1901:4, 1955:19, 1956:8 forbids [2] - 1919:9, 1919:11 foreign [2] - 1940:19, 1942:9 Foreign [1] - 1941:4 foreperson [5] - 1943:22, 1943:24, 1943:25, 1945:17, 1946:17 foreperson's [2] - 1944:1 forget [2] - 1871:25, 1953:9 forgot [1] - 1906:5 form [6] - 1878:14, 1878:19, 1878:25, 1879:13, 1879:14, 1879:20 formal [1] - 1922:1 forth [3] - 1902:24, 1903:24, 1966:23 forthright [1] - 1914:13 forty [2] - 1872:22, 1908:19 forty-five [2] - 1872:22, 1908:19 forward [1] - 1952:17 four [9] - 1876:11, 1893:16, 1932:7, 1951:9, 1965:6, 1968:7, 1969:25, 1975:7, 1977:9</p>
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<p>Four ^[1] - 1931:12 fourth ^[2] - 1939:18, 1942:7 framed ^[1] - 1907:3 framework ^[1] - 1944:7 frankness ^[1] - 1945:4 free ^[2] - 1943:24, 1976:6 fresh ^[1] - 1965:7 friend ^[5] - 1876:6, 1878:21, 1879:8, 1879:16, 1879:22 frightened ^[1] - 1926:9 frightening ^[1] - 1926:2 front ^[1] - 1972:22 full ^[1] - 1945:10 fullest ^[1] - 1945:12 fully ^[1] - 1923:24 function ^[5] - 1918:3, 1940:6, 1944:5, 1944:8, 1962:25 fundamental ^[2] - 1899:13, 1906:6 funny ^[1] - 1891:20 furthering ^[1] - 1923:17 Furthermore ^[2] - 1904:5, 1904:6 furthers ^[1] - 1923:7</p>	<p>1885:18, 1885:19, 1888:3, 1895:15, 1897:2, 1897:4, 1903:13, 1903:18, 1904:4, 1905:9, 1905:11, 1905:15, 1908:23, 1909:17, 1909:20, 1910:2, 1910:11, 1910:13, 1911:8, 1915:23, 1915:25, 1916:3, 1917:22, 1918:13, 1919:9, 1920:16, 1921:3, 1921:17, 1921:25, 1924:8, 1927:10, 1928:4, 1928:25, 1929:14, 1930:25, 1931:18, 1932:8, 1932:24, 1933:17, 1935:4, 1937:2, 1937:6, 1938:1, 1938:11, 1938:12, 1939:14, 1939:20, 1939:24, 1940:4, 1940:6, 1940:14, 1941:16, 1943:14, 1952:10, 1966:14 Government ^[6] - 1870:13, 1874:10, 1874:21, 1892:12, 1966:19, 1966:21 government's ^[9] - 1885:14, 1889:5, 1910:4, 1916:13, 1916:17, 1934:12, 1939:24, 1940:3, 1972:20 grab ^[1] - 1903:2 grand ^[1] - 1896:11 grant ^[1] - 1902:3 granted ^[1] - 1971:17 great ^[8] - 1881:13, 1881:14, 1881:15, 1886:12, 1886:17, 1894:1, 1899:6, 1976:14 greater ^[3] - 1915:9, 1937:22, 1944:3 greatest ^[1] - 1878:9 green ^[2] - 1960:11, 1960:14 Group ^[3] - 1939:8, 1939:9, 1940:8 guess ^[3] - 1885:19, 1894:21, 1930:9 guessing ^[1] - 1908:19 guilt ^[8] - 1885:24, 1910:18, 1911:8, 1911:17, 1911:21, 1911:24, 1913:15, 1923:19 guilty ^[18] - 1885:24, 1886:19, 1886:21, 1903:22, 1904:24, 1910:1, 1910:5, 1910:11, 1910:14, 1910:15, 1910:17, 1917:6, 1918:5, 1937:9, 1938:11, 1939:13, 1940:13, 1941:16 gun ^[2] - 1882:9, 1893:25 guy ^[7] - 1890:11, 1892:8, 1893:2, 1893:25, 1894:6, 1894:7, 1895:4 Guyana ^[7] - 1875:16, 1876:6, 1894:20, 1895:1, 1896:3, 1900:20, 1933:9 guys ^[2] - 1879:10, 1903:2</p>	<p>hardball ^[2] - 1897:5, 1897:7 hardly ^[1] - 1944:8 Harlem ^[2] - 1970:14, 1970:15 harm ^[2] - 1893:8, 1926:6 harming ^[1] - 1883:16 haul ^[1] - 1962:10 head ^[2] - 1882:9, 1897:1 heads ^[1] - 1959:3 hear ^[12] - 1882:5, 1889:15, 1896:12, 1901:4, 1946:14, 1955:8, 1956:8, 1962:4, 1974:5, 1975:10, 1976:3 heard ^[17] - 1875:2, 1882:5, 1887:5, 1897:10, 1908:5, 1908:6, 1915:5, 1915:16, 1915:22, 1917:18, 1920:8, 1927:4, 1936:7, 1956:13, 1961:6, 1969:18, 1976:5 hearing ^[1] - 1898:23 hears ^[1] - 1907:12 hearts ^[1] - 1892:6 heat ^[1] - 1890:22 heels ^[1] - 1955:8 held ^[1] - 1906:9 help ^[5] - 1874:20, 1921:14, 1922:24, 1924:5, 1957:2 helped ^[1] - 1884:14 helpful ^[1] - 1974:14 helping ^[1] - 1902:19 helps ^[1] - 1889:10 herring ^[1] - 1904:17 hesitate ^[3] - 1910:24, 1911:3, 1945:7 hiding ^[1] - 1914:14 high ^[1] - 1887:9 highlight ^[1] - 1950:16 himself ^[1] - 1930:1 hiring ^[1] - 1880:16 Hodges ^[2] - 1951:4, 1951:14 hold ^[2] - 1906:11, 1942:16 holding ^[1] - 1963:10 holds ^[1] - 1942:15 home ^[5] - 1877:12, 1970:7, 1975:12, 1975:15 honestly ^[2] - 1890:13 honesty ^[1] - 1927:1 Honor ^[27] - 1871:4, 1872:12, 1873:14, 1903:9, 1907:6, 1934:8, 1948:21, 1949:5, 1949:20, 1953:19, 1954:1, 1956:5, 1956:15, 1956:19, 1959:18, 1959:19, 1959:20, 1960:25, 1961:7, 1961:10, 1961:22, 1962:1, 1963:8, 1966:7, 1972:11, 1974:22, 1975:18 Honor's ^[2] - 1907:12, 1950:11 HONORABLE ^[1] - 1870:9 hope ^[1] - 1953:6 hopes ^[1] - 1916:8 horrific ^[1] - 1900:14 hour ^[7] - 1872:21, 1872:24, 1882:24, 1884:2, 1902:16, 1965:9, 1965:11 hours ^[7] - 1876:5, 1876:11, 1882:23, 1894:5, 1912:23</p>
G		
<p>gain ^[1] - 1916:9 gang ^[2] - 1884:14, 1884:15 gates ^[1] - 1948:10 gather ^[2] - 1892:14, 1951:16 gathering ^[2] - 1892:17, 1892:22 Gene ^[1] - 1870:22 general ^[1] - 1912:14 gentlemen ^[18] - 1875:2, 1875:5, 1877:1, 1881:23, 1885:17, 1887:5, 1888:20, 1888:23, 1891:2, 1892:1, 1895:8, 1905:4, 1905:17, 1906:8, 1906:15, 1944:5, 1958:14, 1974:8 GEO ^[4] - 1905:9, 1939:8, 1939:9, 1940:8 George ^[6] - 1890:19, 1920:18, 1931:13, 1949:14, 1949:15 GERALD ^[1] - 1870:17 gestures ^[1] - 1926:6 get-go ^[1] - 1895:17 girl ^[1] - 1895:21 gist ^[1] - 1900:17 given ^[8] - 1873:2, 1909:9, 1914:2, 1914:18, 1927:3, 1938:17, 1944:7, 1954:2 glad ^[2] - 1894:2, 1967:2 GLEESON ^[1] - 1870:9 GO ^[3] - 1884:11, 1950:13 goal ^[2] - 1921:13, 1922:23 goals ^[4] - 1921:13, 1922:23, 1923:13, 1924:6 gong ^[1] - 1960:15 government ^[65] - 1872:2, 1876:17, 1876:18, 1876:20, 1876:22, 1877:16, 1877:19, 1877:22, 1882:3, 1884:9,</p>	H	
	<p>half ^[10] - 1872:23, 1884:2, 1887:7, 1898:13, 1903:17, 1905:2, 1906:8, 1963:20, 1965:11 hand ^[5] - 1907:21, 1911:15, 1916:12, 1945:2, 1952:19 hands ^[1] - 1881:14 handwriting ^[1] - 1875:22 hang ^[1] - 1972:9 hard ^[1] - 1880:13</p>	

<p>human ^[1] - 1963:8</p> <p>hurt ^[2] - 1892:19, 1893:7</p> <p>hurting ^[3] - 1881:5, 1891:5, 1892:9</p>	<p>indirect ^[1] - 1912:17</p> <p>indirectly ^[1] - 1938:14</p> <p>individual ^[2] - 1911:21, 1944:20</p> <p>individually ^[1] - 1944:13</p> <p>induce ^[3] - 1926:14, 1936:14, 1939:5</p> <p>induced ^[1] - 1925:3</p> <p>infer ^[3] - 1913:3, 1913:5, 1922:10</p> <p>inference ^[3] - 1892:17, 1916:21, 1917:12</p> <p>inferences ^[1] - 1913:8</p> <p>inferred ^[1] - 1907:9</p> <p>influence ^[8] - 1918:1, 1918:8, 1919:24, 1921:8, 1925:2, 1927:22, 1928:17, 1930:17</p> <p>influenced ^[3] - 1914:22, 1939:23, 1940:3</p> <p>informant ^[4] - 1915:23, 1916:6, 1916:17, 1921:21</p> <p>informants ^[3] - 1916:1, 1916:2, 1916:13</p> <p>information ^[13] - 1892:14, 1901:16, 1902:24, 1927:21, 1929:22, 1931:7, 1931:25, 1932:14, 1933:5, 1933:7, 1933:22, 1934:18, 1935:10</p> <p>informed ^[1] - 1923:24</p> <p>initial ^[3] - 1876:19, 1878:10, 1952:16</p> <p>innocence ^[3] - 1910:13, 1910:16, 1911:25</p> <p>innocent ^[5] - 1881:24, 1882:1, 1910:8, 1910:9, 1917:9</p> <p>inquiry ^[1] - 1924:2</p> <p>inside ^[3] - 1975:21, 1975:22, 1975:24</p> <p>inspect ^[2] - 1904:7, 1943:15</p> <p>inspection ^[1] - 1946:13</p> <p>inspired ^[1] - 1872:9</p> <p>inspiring ^[1] - 1926:3</p> <p>instead ^[3] - 1872:6, 1884:22, 1885:5</p> <p>instruct ^[5] - 1908:7, 1927:16, 1927:24, 1952:10, 1956:6</p> <p>instructed ^[1] - 1918:11</p> <p>instruction ^[4] - 1891:3, 1904:18, 1906:21, 1906:24</p> <p>instructions ^[21] - 1907:12, 1908:9, 1908:13, 1908:14, 1908:17, 1908:20, 1908:22, 1908:25, 1909:6, 1913:19, 1924:15, 1928:21, 1930:22, 1957:18, 1960:6, 1962:8, 1962:12, 1962:14, 1962:15, 1962:16, 1963:2</p> <p>intend ^[8] - 1926:7, 1930:1, 1938:24, 1939:3, 1955:1, 1960:13, 1970:2, 1974:13</p> <p>intended ^[9] - 1909:7, 1921:2, 1931:8, 1932:15, 1933:24, 1934:19, 1948:13, 1948:14, 1975:17</p> <p>intending ^[2] - 1921:14, 1922:23</p> <p>intends ^[1] - 1929:9</p> <p>intent ^[13] - 1887:1, 1889:16, 1918:21, 1919:24, 1921:8, 1924:5, 1925:1, 1928:17, 1928:18, 1929:5, 1929:10, 1930:17, 1930:18</p>	<p>intention ^[6] - 1923:12, 1926:6, 1936:14, 1937:14, 1942:17, 1943:12</p> <p>intentionally ^[9] - 1918:24, 1919:4, 1919:8, 1919:12, 1922:25, 1923:15, 1940:16, 1940:18, 1941:19</p> <p>intercepted ^[1] - 1941:10</p> <p>intercepting ^[4] - 1907:8, 1907:25, 1940:22, 1941:24</p> <p>interception ^[3] - 1941:8, 1943:7, 1943:11</p> <p>interest ^[3] - 1874:5, 1914:22, 1915:3</p> <p>interested ^[2] - 1874:6, 1874:15</p> <p>interrupt ^[1] - 1949:22</p> <p>interview ^[9] - 1916:24, 1927:17, 1931:7, 1931:25, 1932:14, 1933:5, 1933:22, 1934:18, 1935:10</p> <p>interviewed ^[1] - 1916:20</p> <p>interviewing ^[2] - 1880:19, 1949:12</p> <p>intimidate ^[7] - 1921:7, 1929:25, 1930:21, 1932:2, 1932:18, 1933:11, 1934:22</p> <p>intimidation ^[5] - 1872:6, 1919:23, 1924:24, 1926:2, 1930:14</p> <p>introduced ^[1] - 1873:22</p> <p>invested ^[2] - 1882:19, 1894:5</p> <p>investigation ^[1] - 1915:24</p> <p>investigations ^[1] - 1916:1</p> <p>investigative ^[1] - 1918:14</p> <p>investigator ^[7] - 1891:13, 1891:24, 1897:10, 1897:11, 1900:24, 1901:8, 1927:20</p> <p>Investigator ^[1] - 1884:6</p> <p>investigators ^[4] - 1880:17, 1891:17, 1897:11, 1905:14</p> <p>involved ^[3] - 1877:8, 1922:12, 1931:4</p> <p>involvement ^[2] - 1929:18, 1931:21</p> <p>involves ^[1] - 1872:6</p> <p>involving ^[1] - 1920:25</p> <p>iota ^[1] - 1898:4</p> <p>irrelevant ^[2] - 1916:14, 1916:17</p> <p>IRVING ^[1] - 1870:6</p> <p>Irving ^[29] - 1870:20, 1876:16, 1877:17, 1877:23, 1878:7, 1878:19, 1879:8, 1879:11, 1879:17, 1899:4, 1900:16, 1906:2, 1909:22, 1917:2, 1917:12, 1917:16, 1920:5, 1924:13, 1929:15, 1930:25, 1931:18, 1932:8, 1933:17, 1934:13, 1935:4, 1936:3, 1955:6, 1955:18, 1966:22</p> <p>issue ^[16] - 1878:24, 1880:3, 1880:4, 1883:20, 1893:17, 1904:22, 1905:1, 1907:3, 1917:21, 1923:19, 1936:23, 1940:2, 1950:16, 1953:25, 1954:9, 1960:22</p> <p>issues ^[6] - 1909:13, 1944:18, 1945:3, 1945:6, 1945:11, 1945:13</p> <p>item ^[2] - 1942:25, 1957:1</p> <p>items ^[1] - 1942:22</p> <p>itself ^[2] - 1951:6, 1958:9</p>
<p>I</p>		
<p>idea ^[1] - 1889:5</p> <p>identical ^[1] - 1920:3</p> <p>identified ^[1] - 1936:24</p> <p>identifies ^[1] - 1956:19</p> <p>identifying ^[1] - 1956:11</p> <p>identities ^[1] - 1923:23</p> <p>ignorance ^[1] - 1918:25</p> <p>ignored ^[4] - 1904:6, 1904:10, 1906:3, 1946:7</p> <p>Ill ^[1] - 1900:6</p> <p>Ilene ^[8] - 1873:6, 1951:16, 1951:20, 1959:1, 1959:13, 1961:9, 1975:12, 1975:17</p> <p>ill ^[1] - 1905:16</p> <p>ill-chosen ^[1] - 1905:16</p> <p>illegal ^[3] - 1894:9, 1896:17, 1923:17</p> <p>illegally ^[1] - 1882:8</p> <p>imagine ^[1] - 1876:4</p> <p>immaterial ^[1] - 1950:15</p> <p>impartial ^[2] - 1911:11, 1911:15</p> <p>impartiality ^[1] - 1909:15</p> <p>impeachment ^[1] - 1906:23</p> <p>implicate ^[1] - 1918:21</p> <p>implication ^[2] - 1885:11, 1885:14</p> <p>implicit ^[1] - 1936:2</p> <p>importance ^[1] - 1910:25</p> <p>important ^[9] - 1909:20, 1911:4, 1944:8, 1951:7, 1953:3, 1955:5, 1957:2, 1962:10, 1962:25</p> <p>imported ^[3] - 1940:11, 1943:9, 1943:11</p> <p>importing ^[1] - 1920:7</p> <p>imposed ^[1] - 1918:7</p> <p>imposing ^[1] - 1918:1</p> <p>impossible ^[1] - 1889:20</p> <p>impressed ^[1] - 1914:12</p> <p>impression ^[1] - 1955:2</p> <p>inappropriate ^[1] - 1873:2</p> <p>incentive ^[1] - 1916:2</p> <p>inclined ^[1] - 1954:3</p> <p>include ^[1] - 1941:10</p> <p>included ^[1] - 1936:5</p> <p>includes ^[1] - 1926:2</p> <p>including ^[1] - 1921:23</p> <p>inconsistent ^[1] - 1904:14</p> <p>inconvenience ^[1] - 1964:5</p> <p>incorporate ^[1] - 1872:5</p> <p>indeed ^[2] - 1916:25, 1917:15</p> <p>Indian ^[1] - 1879:7</p> <p>indicate ^[2] - 1929:10, 1946:20</p> <p>indicates ^[1] - 1957:21</p> <p>indication ^[1] - 1955:9</p> <p>indictment ^[1] - 1909:23</p>		

<p style="text-align: center;">J</p> <p>jack [1] - 1895:24 Jackson [2] - 1951:4, 1951:14 Jagnarain [7] - 1920:20, 1934:4, 1934:14, 1934:18, 1934:22, 1935:7, 1936:10 jail [12] - 1875:20, 1876:2, 1876:7, 1877:12, 1878:13, 1879:21, 1884:12, 1897:16, 1899:21, 1900:7, 1902:22, 1939:25 Jainarine [6] - 1920:18, 1932:4, 1932:9, 1932:14, 1932:16, 1932:18 JAVIER [1] - 1870:19 Jenab [3] - 1951:11, 1951:22, 1953:5 job [5] - 1883:6, 1883:8, 1902:2, 1908:6, 1929:17 JOHN [1] - 1870:9 joined [3] - 1901:22, 1921:23, 1924:3 joins [1] - 1962:4 joint [1] - 1922:7 Judge [12] - 1871:6, 1873:1, 1894:18, 1907:2, 1950:22, 1952:6, 1963:25, 1967:4, 1972:17, 1974:18, 1976:1 JUDGE [1] - 1870:10 judge [13] - 1871:24, 1872:19, 1880:7, 1882:14, 1884:1, 1902:10, 1903:5, 1909:11, 1955:3, 1961:11, 1969:11, 1970:2, 1972:8 judge's [1] - 1960:6 judges [2] - 1909:10, 1913:24 judges's [1] - 1904:18 judgment [2] - 1913:9, 1944:20 July [1] - 1895:18 June [5] - 1875:21, 1890:17, 1893:4, 1940:11 juries [1] - 1946:5 jurisdiction [2] - 1939:20, 1940:4 Juror [1] - 1943:23 juror [2] - 1943:25, 1948:3 jurors [17] - 1871:14, 1871:20, 1909:14, 1910:17, 1913:24, 1918:6, 1944:4, 1945:1, 1945:13, 1951:8, 1953:19, 1955:16, 1956:20, 1962:21, 1965:6, 1965:9, 1976:9 Jury [1] - 1954:5 jury [73] - 1870:10, 1871:1, 1871:10, 1873:6, 1873:8, 1882:14, 1882:15, 1886:1, 1900:19, 1905:4, 1905:17, 1906:15, 1907:3, 1907:11, 1909:5, 1910:10, 1913:14, 1915:6, 1917:25, 1918:18, 1919:18, 1927:24, 1944:14, 1946:9, 1946:13, 1946:17, 1949:25, 1950:12, 1950:17, 1951:13, 1951:16, 1953:11, 1953:13, 1953:16, 1953:23, 1954:22, 1955:16, 1955:20, 1956:16, 1956:17, 1958:18, 1959:7, 1960:1, 1960:4, 1960:19, 1961:21, 1961:23, 1962:13, 1963:4, 1963:6, 1963:9,</p>	<p>1963:10, 1963:11, 1964:1, 1965:1, 1965:4, 1966:1, 1966:11, 1968:1, 1968:7, 1969:25, 1970:3, 1970:20, 1972:14, 1975:3, 1975:23, 1977:5, 1977:7, 1977:8, 1977:9, 1977:11, 1977:13 jury's [1] - 1946:5 justice [4] - 1902:16, 1902:18, 1902:19, 1902:20 Justice [1] - 1939:12 justified [1] - 1913:9</p> <p style="text-align: center;">K</p> <p>keep [8] - 1882:18, 1891:4, 1897:20, 1948:2, 1951:3, 1951:9, 1951:11, 1970:3 keeping [1] - 1887:16 keeps [1] - 1942:19 kept [1] - 1883:23 key [2] - 1924:2, 1942:10 Khan [40] - 1875:6, 1876:24, 1877:11, 1878:14, 1879:19, 1880:12, 1898:22, 1898:24, 1899:14, 1900:21, 1901:17, 1919:23, 1920:15, 1921:9, 1927:16, 1928:11, 1928:18, 1929:18, 1929:23, 1930:18, 1931:3, 1931:8, 1931:10, 1932:17, 1933:2, 1933:6, 1933:20, 1933:23, 1933:25, 1934:15, 1934:19, 1934:21, 1936:16, 1937:16, 1938:18, 1943:14, 1943:16, 1949:7, 1949:10 Khan's [9] - 1875:23, 1884:14, 1929:18, 1930:2, 1931:21, 1932:1, 1932:15, 1935:11, 1935:12 kill [2] - 1890:11, 1892:19 killed [2] - 1885:5, 1885:8 killing [1] - 1890:25 kind [2] - 1905:22, 1963:12 knowingly [8] - 1918:24, 1919:1, 1919:11, 1922:25, 1925:1, 1926:13, 1928:17, 1930:16 knowledge [7] - 1914:21, 1915:19, 1918:21, 1921:13, 1922:22, 1923:6, 1923:11 known [7] - 1920:18, 1920:19, 1923:23, 1931:13, 1932:4, 1932:20 knows [5] - 1879:18, 1899:16, 1901:25, 1923:5, 1959:1</p> <p style="text-align: center;">L</p> <p>lack [7] - 1910:23, 1911:12, 1911:23, 1912:2, 1918:12, 1929:18, 1931:21 ladies [18] - 1875:2, 1875:5, 1877:1, 1881:23, 1885:17, 1887:5, 1888:20, 1888:23, 1891:2, 1892:1, 1895:8, 1905:4, 1905:17, 1906:8, 1906:15, 1944:5, 1958:14, 1974:8 lady [2] - 1884:10, 1895:12</p>	<p>language [3] - 1907:7, 1907:16, 1907:23 laptop [1] - 1943:6 laptops [2] - 1971:3, 1972:24 last [9] - 1887:6, 1887:15, 1904:4, 1907:12, 1908:19, 1934:3, 1934:23, 1957:11, 1965:11 late [2] - 1949:2, 1970:6 laughed [1] - 1891:22 launch [1] - 1905:12 law [36] - 1875:13, 1883:25, 1884:3, 1885:7, 1897:15, 1908:7, 1908:8, 1908:11, 1908:12, 1908:13, 1908:15, 1909:1, 1909:11, 1909:12, 1909:19, 1909:24, 1910:7, 1911:8, 1912:14, 1913:11, 1913:13, 1913:21, 1915:5, 1915:7, 1915:10, 1915:12, 1915:14, 1919:8, 1919:10, 1920:25, 1923:9, 1936:18, 1942:13, 1944:7, 1962:17, 1962:23 LAW [1] - 1972:11 lawful [5] - 1926:23, 1927:12, 1927:15, 1936:13, 1937:13 LAWRENCE [1] - 1870:20 lawyer [16] - 1877:22, 1881:3, 1881:6, 1881:8, 1884:15, 1887:3, 1888:7, 1889:22, 1890:3, 1891:2, 1896:20, 1901:20, 1905:23, 1907:19, 1926:22, 1962:20 lawyer's [1] - 1926:23 lawyerese [1] - 1890:3 lawyers [19] - 1880:14, 1883:5, 1890:10, 1890:11, 1905:15, 1906:3, 1906:7, 1907:13, 1907:17, 1908:10, 1912:8, 1960:10, 1960:16, 1960:21, 1962:18, 1962:19, 1962:20, 1962:21, 1963:17 leads [1] - 1880:18 learning [1] - 1915:18 least [5] - 1896:5, 1897:22, 1921:22, 1923:11, 1924:4 leave [15] - 1876:8, 1876:9, 1879:17, 1879:18, 1926:20, 1951:18, 1955:1, 1955:23, 1957:15, 1957:19, 1958:12, 1974:9, 1975:3, 1976:6, 1976:10 leaving [1] - 1955:8 ledge [1] - 1893:11 left [1] - 1909:4 legal [6] - 1888:8, 1896:16, 1896:18, 1926:23, 1927:13, 1927:15 legalese [1] - 1888:6 legitimate [5] - 1880:11, 1891:12, 1891:17, 1900:23, 1915:11 length [1] - 1873:3 lengthy [1] - 1971:22 Leslie [1] - 1885:25 Leslyn [13] - 1886:6, 1886:11, 1888:15, 1896:19, 1898:12, 1899:12, 1900:1, 1920:6, 1920:20, 1933:12, 1938:9, 1938:15</p>
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<p>less [2] - 1915:9, 1952:25 lesser [2] - 1915:9, 1937:20 letter [10] - 1872:14, 1874:21, 1874:22, 1874:23, 1875:6, 1875:18, 1875:24, 1876:5, 1876:12, 1900:9 letters [4] - 1875:20, 1876:1, 1903:24, 1904:3 leverage [1] - 1899:19 lexicon [1] - 1891:2 liar [4] - 1878:12, 1879:10, 1893:2, 1894:6 licensed [2] - 1880:17, 1897:11 lie [4] - 1882:4, 1884:12, 1895:14, 1916:9 lies [1] - 1905:9 life [4] - 1886:6, 1886:7, 1902:7, 1911:1 light [2] - 1907:10, 1913:9 likely [1] - 1937:21 limit [1] - 1952:15 limited [3] - 1880:1, 1880:2, 1896:25 line [8] - 1878:4, 1890:17, 1900:3, 1973:1, 1973:2, 1973:11, 1973:13 linking [1] - 1900:2 LIPTON [4] - 1870:17, 1961:17, 1964:20, 1970:13 list [3] - 1879:2, 1887:7, 1894:21 listen [20] - 1877:12, 1887:17, 1888:24, 1888:25, 1889:11, 1889:12, 1899:24, 1899:25, 1903:1, 1904:17, 1945:5, 1955:13, 1956:3, 1956:4, 1956:7, 1956:10, 1956:12 listened [1] - 1955:17 literally [1] - 1969:16 live [1] - 1902:8 loaded [2] - 1882:11, 1891:6 locate [7] - 1927:20, 1929:22, 1931:24, 1933:4, 1933:21, 1934:17, 1935:9 located [1] - 1933:9 locked [1] - 1877:8 locker [2] - 1887:10, 1891:9 logical [1] - 1963:11 Loo [1] - 1896:3 look [18] - 1874:4, 1877:1, 1878:24, 1884:24, 1887:15, 1889:24, 1891:14, 1892:23, 1893:19, 1895:16, 1895:21, 1896:4, 1904:3, 1905:19, 1948:17, 1960:17 Look [1] - 1897:3 looking [3] - 1887:24, 1889:7, 1971:17 loose [1] - 1887:12 lose [3] - 1896:13, 1902:2, 1963:1 losing [1] - 1960:9 louder [2] - 1892:2, 1922:13 love [1] - 1962:20 lower [1] - 1900:8 Lower [1] - 1970:17 lowering [1] - 1900:10 luck [2] - 1897:9, 1898:12</p>	<p>lunatic [2] - 1893:2, 1894:7 lunch [4] - 1953:8, 1958:24, 1964:21, 1964:22 lying [7] - 1879:19, 1888:11, 1888:13, 1888:16, 1893:18, 1895:16, 1916:7</p> <p style="text-align: center;">M</p> <p>machine [1] - 1975:8 mail [3] - 1940:17, 1940:18, 1942:9 Mail [1] - 1903:2 mailing [1] - 1903:1 mails [2] - 1904:20, 1904:21 main [1] - 1875:12 major [1] - 1923:22 man [1] - 1891:3 Man [1] - 1874:21 managing [1] - 1939:9 Manhattan [1] - 1970:17 manipulative [1] - 1905:6 manner [1] - 1960:21 March [1] - 1939:7 marked [9] - 1960:5, 1964:25, 1966:16, 1968:9, 1969:24, 1970:1, 1971:4, 1974:23, 1975:5 MARSHAL [1] - 1952:18 marshal [4] - 1945:23, 1952:17, 1952:20, 1965:10 Marshal [1] - 1950:15 Martin [8] - 1891:19, 1891:20, 1891:21, 1897:13, 1901:8, 1901:10, 1901:11, 1903:3 Marvin [4] - 1876:21, 1876:22, 1876:23, 1877:7 mastermind [1] - 1901:20 material [3] - 1892:22, 1939:17, 1939:23 materiality [1] - 1940:2 materials [2] - 1892:18, 1892:24 matter [15] - 1881:3, 1881:15, 1881:23, 1881:25, 1882:3, 1907:4, 1907:13, 1909:6, 1910:25, 1912:14, 1914:4, 1917:4, 1926:8, 1939:20, 1946:19 matters [1] - 1961:4 Mazzella [5] - 1883:21, 1884:6, 1884:18, 1886:2, 1906:13 MCC [2] - 1954:12, 1956:3 mean [19] - 1876:4, 1886:18, 1887:21, 1888:5, 1890:25, 1893:18, 1919:9, 1954:25, 1963:19, 1968:10, 1968:13, 1968:15, 1968:16, 1968:21, 1969:2, 1969:9, 1969:10, 1969:22 meaning [7] - 1886:23, 1886:25, 1887:1, 1887:2, 1930:20, 1930:22, 1942:12 means [22] - 1891:5, 1922:3, 1922:6, 1922:25, 1924:7, 1926:5, 1926:12, 1926:25, 1928:20, 1929:8, 1937:6, 1937:18, 1937:20, 1937:21, 1940:5,</p>	<p>1941:4, 1942:16, 1951:4, 1958:20, 1958:22, 1969:16 meant [2] - 1888:22, 1888:25 mechanical [1] - 1870:24 meet [2] - 1883:6, 1959:10 meeting [20] - 1874:5, 1874:13, 1874:14, 1874:17, 1876:19, 1878:2, 1878:4, 1878:11, 1884:25, 1893:4, 1893:6, 1893:9, 1893:16, 1899:5, 1899:7, 1899:11, 1899:12, 1902:17, 1955:6 meetings [4] - 1877:18, 1877:24, 1900:18, 1901:2 member [10] - 1878:17, 1878:18, 1878:20, 1921:12, 1922:22, 1923:3, 1923:19, 1923:23, 1924:1, 1924:10 members [1] - 1884:15 memo [6] - 1883:12, 1898:6, 1899:1, 1899:2, 1899:4, 1901:12 memos [1] - 1898:6 mention [1] - 1898:15 mentioned [10] - 1883:4, 1909:4, 1915:6, 1926:21, 1928:12, 1951:21, 1952:1, 1952:4, 1954:10, 1961:2 mere [3] - 1915:7, 1929:6, 1938:22 merely [2] - 1923:2, 1923:7 merit [1] - 1955:16 message [1] - 1874:8 messages [1] - 1880:7 messaging [1] - 1900:19 met [1] - 1896:11 might [7] - 1889:1, 1889:4, 1898:16, 1903:5, 1913:3, 1913:5, 1956:12 mind [6] - 1893:10, 1911:21, 1926:25, 1928:2, 1945:4, 1958:8 mindlessly [1] - 1900:24 minimum [1] - 1898:1 minor [1] - 1923:22 minute [5] - 1882:24, 1882:25, 1926:19, 1948:11, 1961:15 minutes [11] - 1872:22, 1875:5, 1901:25, 1903:9, 1908:20, 1924:18, 1943:20, 1964:21, 1964:22, 1965:10, 1976:10 mirror [1] - 1905:20 mischaracterized [1] - 1879:25 misconstrued [1] - 1892:15 misfortune [1] - 1906:1 misrepresenting [1] - 1877:16 miss [1] - 1967:2 misstatement [1] - 1970:23 mistake [4] - 1889:22, 1905:17, 1918:25, 1919:7 moment [1] - 1891:11 momentarily [1] - 1928:24 moments [2] - 1927:8, 1928:12 Monday [1] - 1885:3 money [17] - 1882:21, 1886:12, 1896:8, 1896:14, 1897:5, 1897:7, 1898:20, 1898:24, 1920:22, 1931:5,</p>
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<p>1931:22, 1932:11, 1933:2, 1933:20, 1934:16, 1935:8, 1938:15</p> <p>monitor [1] - 1874:2</p> <p>months [4] - 1899:3, 1899:9, 1904:6, 1953:10</p> <p>morning [8] - 1871:2, 1871:4, 1871:5, 1871:6, 1871:13, 1873:9, 1873:17, 1885:4</p> <p>MORRIS [1] - 1870:14</p> <p>most [8] - 1892:16, 1892:25, 1900:18, 1911:3, 1939:22, 1941:7, 1962:2, 1962:19</p> <p>mother [5] - 1890:22, 1890:24, 1890:25, 1901:11, 1901:14</p> <p>motion [6] - 1894:16, 1894:17, 1895:4, 1902:10, 1971:11, 1971:16</p> <p>motions [1] - 1972:5</p> <p>motivated [1] - 1916:8</p> <p>motivation [2] - 1916:9, 1916:11</p> <p>mouth [1] - 1888:19</p> <p>moved [1] - 1872:15</p> <p>MR [129] - 1871:4, 1871:6, 1871:7, 1871:10, 1871:21, 1871:22, 1871:24, 1872:12, 1872:17, 1872:19, 1873:1, 1873:5, 1873:7, 1873:14, 1873:17, 1896:1, 1903:9, 1903:11, 1906:23, 1907:1, 1907:23, 1934:7, 1948:13, 1948:17, 1948:18, 1948:20, 1948:21, 1948:22, 1949:23, 1950:1, 1950:3, 1950:6, 1950:7, 1950:10, 1950:20, 1950:22, 1952:6, 1953:19, 1954:1, 1954:13, 1955:3, 1956:5, 1956:14, 1956:15, 1957:7, 1957:8, 1959:18, 1959:19, 1959:20, 1960:13, 1960:25, 1961:5, 1961:7, 1961:11, 1961:14, 1961:17, 1963:8, 1963:15, 1963:19, 1963:22, 1963:25, 1964:5, 1964:10, 1964:16, 1964:19, 1964:20, 1964:21, 1966:3, 1966:6, 1966:9, 1966:18, 1966:25, 1967:3, 1967:8, 1968:5, 1968:6, 1968:10, 1968:14, 1968:18, 1968:20, 1968:23, 1968:24, 1969:1, 1969:4, 1969:6, 1969:11, 1969:19, 1970:2, 1970:8, 1970:12, 1970:13, 1970:14, 1970:16, 1970:17, 1971:5, 1971:10, 1971:14, 1971:15, 1971:24, 1971:25, 1972:3, 1972:17, 1973:1, 1973:2, 1973:4, 1973:5, 1973:9, 1973:12, 1973:14, 1973:17, 1973:19, 1973:20, 1973:22, 1973:23, 1973:24, 1973:25, 1974:4, 1974:5, 1974:16, 1974:18, 1974:20, 1974:22, 1975:17, 1975:21, 1975:23, 1976:1, 1976:7, 1976:12, 1976:14</p> <p>murder [1] - 1881:22</p> <p>murdered [1] - 1881:21</p> <p>murderer [1] - 1881:21</p> <p>must [33] - 1908:13, 1908:24, 1909:11, 1910:2, 1910:9, 1910:15, 1911:1, 1911:20, 1911:22, 1912:1, 1912:12,</p>	<p>1916:21, 1918:18, 1919:6, 1921:4, 1921:17, 1921:22, 1923:10, 1923:15, 1924:22, 1937:4, 1937:8, 1937:24, 1938:12, 1938:19, 1938:24, 1939:14, 1940:1, 1940:5, 1940:14, 1941:16, 1944:9</p> <p>mutual [1] - 1922:6</p> <p style="text-align: center;">N</p> <p>named [1] - 1879:15</p> <p>narcotics [3] - 1920:15, 1928:11, 1943:16</p> <p>narcotics-trafficking [2] - 1920:15, 1943:16</p> <p>narrow [2] - 1880:3, 1936:23</p> <p>nature [2] - 1922:8, 1929:17</p> <p>necessary [7] - 1916:25, 1917:24, 1918:2, 1945:15, 1951:9, 1961:2, 1961:3</p> <p>need [26] - 1871:7, 1872:4, 1881:17, 1882:16, 1894:19, 1894:22, 1910:6, 1913:20, 1921:25, 1922:1, 1923:22, 1923:24, 1923:25, 1926:7, 1943:21, 1947:2, 1948:25, 1950:11, 1950:16, 1950:18, 1951:20, 1953:11, 1961:25, 1966:11, 1970:23, 1973:25</p> <p>needed [2] - 1888:2, 1953:12</p> <p>needs [3] - 1890:20, 1924:8, 1974:1</p> <p>neutralize [4] - 1890:6, 1890:7, 1890:10</p> <p>never [14] - 1876:12, 1885:16, 1888:13, 1888:16, 1893:13, 1893:14, 1894:8, 1896:4, 1896:11, 1897:6, 1910:5, 1917:7, 1917:8, 1917:9</p> <p>nevertheless [1] - 1937:8</p> <p>NEW [1] - 1870:1</p> <p>new [1] - 1971:1</p> <p>New [2] - 1870:5, 1870:23</p> <p>news [1] - 1885:19</p> <p>next [20] - 1872:16, 1874:17, 1879:13, 1893:6, 1893:9, 1895:25, 1898:24, 1900:11, 1900:12, 1925:5, 1935:13, 1947:3, 1950:24, 1959:10, 1959:15, 1959:24, 1964:25, 1965:15, 1967:10, 1973:12</p> <p>nice [3] - 1873:10, 1912:22, 1967:3</p> <p>Nigel [2] - 1881:11, 1881:12</p> <p>night [2] - 1872:20, 1887:15</p> <p>nightmare [1] - 1903:4</p> <p>Nine [2] - 1924:19, 1934:23</p> <p>nine [8] - 1878:5, 1924:16, 1926:17, 1927:14, 1928:8, 1950:2, 1952:12, 1952:14</p> <p>non [3] - 1915:10, 1954:21, 1959:9</p> <p>non-controversial [2] - 1954:21, 1959:9</p> <p>non-law-enforcement [1] - 1915:10</p> <p>nonexistence [1] - 1912:19</p>	<p>nonresponsive [1] - 1972:20</p> <p>note [41] - 1874:14, 1898:25, 1907:3, 1945:16, 1945:18, 1945:23, 1946:12, 1946:16, 1946:18, 1956:22, 1957:16, 1957:21, 1957:24, 1958:22, 1959:4, 1959:5, 1959:8, 1959:15, 1960:3, 1960:4, 1962:7, 1965:4, 1966:10, 1966:11, 1968:4, 1968:7, 1969:15, 1969:25, 1970:5, 1970:20, 1971:1, 1972:21, 1974:7, 1975:3, 1977:5, 1977:7, 1977:8, 1977:9, 1977:11, 1977:13</p> <p>notes [6] - 1959:12, 1970:21, 1971:16, 1972:4, 1974:1</p> <p>nothing [20] - 1874:7, 1876:18, 1880:16, 1880:18, 1880:19, 1880:21, 1884:19, 1884:20, 1884:21, 1889:3, 1897:4, 1899:22, 1900:3, 1901:1, 1901:2, 1909:5, 1946:25, 1950:10, 1955:18, 1975:10</p> <p>nothing's [1] - 1901:5</p> <p>notice [1] - 1954:7</p> <p>noticed [3] - 1889:1, 1898:14, 1953:20</p> <p>number [6] - 1871:21, 1871:23, 1879:14, 1895:23, 1948:3</p> <p>numbers [3] - 1891:18, 1897:7, 1900:13</p> <p>numerical [1] - 1946:23</p> <p style="text-align: center;">O</p> <p>o'clock [5] - 1870:6, 1958:23, 1966:2, 1974:10, 1975:4</p> <p>oath [3] - 1893:12, 1918:6, 1945:12</p> <p>oaths [1] - 1906:3</p> <p>object [4] - 1922:3, 1955:14, 1969:11, 1975:16</p> <p>objected [1] - 1952:10</p> <p>objection [19] - 1912:10, 1948:15, 1948:22, 1950:5, 1950:19, 1950:20, 1955:15, 1960:24, 1963:14, 1963:16, 1964:16, 1968:14, 1968:23, 1968:24, 1971:11, 1971:12, 1974:17, 1974:21, 1975:25</p> <p>objections [5] - 1950:9, 1959:17, 1971:8, 1971:16, 1972:5</p> <p>objective [1] - 1919:6</p> <p>objectives [2] - 1923:8, 1923:11</p> <p>obligation [4] - 1917:3, 1918:14, 1918:15, 1928:3</p> <p>obligations [1] - 1927:2</p> <p>obliged [1] - 1916:22</p> <p>observance [1] - 1927:2</p> <p>observe [1] - 1913:3</p> <p>observed [1] - 1913:4</p> <p>obstruct [3] - 1902:19, 1902:20</p> <p>obstructing [1] - 1902:16</p> <p>obstruction [1] - 1902:18</p> <p>obtain [9] - 1927:21, 1931:7, 1931:25,</p>
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<p>1932:14, 1933:5, 1933:22, 1934:18, 1935:10, 1941:7</p> <p>obtaining [1] - 1929:7</p> <p>obvious [2] - 1906:6, 1956:8</p> <p>obviously [9] - 1882:9, 1895:3, 1903:19, 1944:1, 1951:6, 1954:23, 1956:18, 1960:21, 1962:24</p> <p>occurred [11] - 1871:1, 1953:16, 1954:11, 1958:18, 1960:1, 1963:6, 1964:1, 1965:1, 1966:1, 1968:1, 1972:14</p> <p>OF [3] - 1870:1, 1870:3, 1870:9</p> <p>offense [9] - 1913:21, 1921:1, 1928:12, 1929:7, 1930:12, 1932:22, 1949:6, 1950:13, 1960:16</p> <p>offenses [1] - 1918:15</p> <p>offer [3] - 1920:22, 1938:22, 1938:25</p> <p>offered [3] - 1874:20, 1938:15, 1939:1</p> <p>offeree [1] - 1939:1</p> <p>offering [5] - 1931:9, 1932:16, 1933:24, 1934:20, 1938:21</p> <p>Office [1] - 1897:18</p> <p>office [11] - 1875:13, 1884:7, 1896:5, 1900:20, 1903:18, 1905:2, 1908:2, 1933:7, 1939:5, 1970:10, 1970:15</p> <p>officer [3] - 1884:11, 1894:1, 1915:8</p> <p>official [3] - 1925:3, 1925:4, 1940:8</p> <p>often [1] - 1922:13</p> <p>oftentimes [1] - 1899:11</p> <p>old [1] - 1875:16</p> <p>once [2] - 1893:15, 1971:19</p> <p>One [8] - 1920:12, 1924:16, 1926:16, 1926:20, 1927:6, 1927:25, 1936:8, 1938:3</p> <p>one [75] - 1871:14, 1871:22, 1871:25, 1877:23, 1879:4, 1879:8, 1880:13, 1882:6, 1882:23, 1882:24, 1882:25, 1883:5, 1883:6, 1886:16, 1887:15, 1892:3, 1892:6, 1893:11, 1893:18, 1895:20, 1895:23, 1897:21, 1898:4, 1901:12, 1901:14, 1901:15, 1901:19, 1901:20, 1904:4, 1906:22, 1908:9, 1908:14, 1912:16, 1914:25, 1916:9, 1916:10, 1920:4, 1921:19, 1927:14, 1937:9, 1943:23, 1945:25, 1948:3, 1949:1, 1950:2, 1951:8, 1951:23, 1951:24, 1952:1, 1952:8, 1953:7, 1953:15, 1958:20, 1958:22, 1960:4, 1960:18, 1961:15, 1962:3, 1962:16, 1962:18, 1963:20, 1964:9, 1964:17, 1965:6, 1966:21, 1970:22, 1971:11, 1972:9, 1972:19, 1973:25, 1975:1, 1977:5</p> <p>one's [2] - 1901:18, 1927:1</p> <p>ones [2] - 1952:15, 1958:2</p> <p>open [9] - 1908:4, 1945:4, 1945:20, 1946:15, 1948:5, 1948:10, 1951:1, 1954:16, 1957:9</p> <p>opening [3] - 1886:23, 1898:14, 1949:8</p>	<p>openings [1] - 1912:9</p> <p>operability [1] - 1904:22</p> <p>operate [1] - 1910:13</p> <p>operational [1] - 1904:23</p> <p>opinion [2] - 1909:2, 1909:7</p> <p>opinions [2] - 1915:20, 1945:7</p> <p>opposite [2] - 1896:22, 1899:8</p> <p>oral [3] - 1940:23, 1941:24, 1943:8</p> <p>orally [1] - 1945:20</p> <p>order [8] - 1917:15, 1931:25, 1932:14, 1933:22, 1934:18, 1935:10, 1939:13, 1943:22</p> <p>ordered [2] - 1877:11, 1912:11</p> <p>orderly [1] - 1943:23</p> <p>original [2] - 1904:7, 1904:8</p> <p>originally [1] - 1872:20</p> <p>otherwise [3] - 1895:22, 1963:10, 1975:12</p> <p>ought [1] - 1896:9</p> <p>outcome [2] - 1914:23, 1915:4</p> <p>outset [1] - 1962:14</p> <p>outside [3] - 1913:6, 1941:5, 1945:24</p> <p>over-analyzing [1] - 1905:14</p> <p>overruled [1] - 1969:17</p> <p>overview [1] - 1919:21</p> <p>overwhelming [1] - 1886:20</p> <p>overzealous [1] - 1905:13</p> <p>own [7] - 1889:8, 1897:16, 1905:8, 1905:16, 1910:25, 1911:4, 1916:12</p> <p>ownership [1] - 1943:2</p>	<p>1937:9, 1941:6, 1946:1, 1955:7, 1974:14</p> <p>particular's [1] - 1946:3</p> <p>parties [9] - 1909:17, 1909:18, 1912:6, 1918:16, 1922:11, 1941:9, 1945:9, 1951:5, 1951:15</p> <p>partnership [1] - 1920:24</p> <p>password [1] - 1971:2</p> <p>passwords [1] - 1972:23</p> <p>past [2] - 1960:18, 1974:11</p> <p>patient [1] - 1946:4</p> <p>Paul [4] - 1874:24, 1875:1, 1875:3, 1876:6</p> <p>pause [7] - 1961:16, 1961:20, 1970:9, 1970:18, 1972:2, 1973:15, 1975:2</p> <p>pay [7] - 1888:16, 1891:21, 1896:20, 1897:7, 1898:12, 1905:8, 1939:3</p> <p>paying [5] - 1880:6, 1881:4, 1892:5, 1892:7, 1933:20</p> <p>payment [7] - 1892:22, 1931:4, 1931:22, 1932:11, 1933:2, 1934:15, 1935:8</p> <p>payments [5] - 1891:17, 1927:21, 1931:11, 1934:1</p> <p>Peduzzi [3] - 1951:11, 1951:22, 1953:5</p> <p>Pemberton [9] - 1920:19, 1932:20, 1932:25, 1933:5, 1933:9, 1933:11, 1936:4, 1936:6, 1936:11</p> <p>pencils [1] - 1959:9</p> <p>people [36] - 1873:19, 1874:15, 1879:3, 1880:22, 1881:4, 1881:5, 1881:22, 1882:7, 1882:8, 1882:17, 1883:6, 1883:16, 1883:17, 1883:19, 1884:14, 1885:5, 1885:20, 1892:9, 1892:16, 1893:7, 1893:8, 1894:18, 1896:4, 1896:11, 1902:1, 1902:4, 1905:18, 1912:23, 1920:25, 1921:5, 1921:18, 1941:7, 1962:19</p> <p>perceived [1] - 1914:24</p> <p>percent [2] - 1881:9, 1903:20</p> <p>perfect [3] - 1949:13, 1949:14, 1964:10</p> <p>perfectly [1] - 1954:25</p> <p>perform [2] - 1923:20, 1923:21</p> <p>performance [1] - 1911:7</p> <p>period [8] - 1930:7, 1930:11, 1931:15, 1932:5, 1932:21, 1933:15, 1934:9, 1941:13</p> <p>perjury [2] - 1893:22, 1893:25</p> <p>permissible [2] - 1927:17, 1927:19</p> <p>permit [1] - 1882:14</p> <p>permitted [1] - 1915:25</p> <p>person [26] - 1881:7, 1891:3, 1910:22, 1910:24, 1911:2, 1918:24, 1919:4, 1921:19, 1923:3, 1923:5, 1923:6, 1923:8, 1924:19, 1924:25, 1925:2, 1925:3, 1926:2, 1926:8, 1926:11, 1926:14, 1929:9, 1933:10, 1942:15, 1942:19, 1942:22, 1963:10</p> <p>personal [3] - 1910:25, 1916:8,</p>
	<p style="text-align: center;">P</p> <p>pads [1] - 1958:16</p> <p>page [20] - 1877:6, 1877:14, 1877:21, 1878:4, 1879:13, 1889:24, 1890:1, 1895:25, 1925:5, 1935:13, 1947:3, 1950:24, 1952:6, 1959:24, 1964:25, 1965:15, 1967:10, 1972:25, 1973:12</p> <p>pages [3] - 1876:6, 1876:7</p> <p>paid [4] - 1891:11, 1891:19, 1915:22, 1916:1</p> <p>Panasonic [1] - 1943:6</p> <p>paper [1] - 1969:25</p> <p>paragraph [1] - 1972:20</p> <p>paraphrasing [1] - 1876:18</p> <p>park [1] - 1965:9</p> <p>parking [1] - 1880:6</p> <p>parsing [1] - 1962:24</p> <p>part [10] - 1876:25, 1877:13, 1879:5, 1891:20, 1909:8, 1914:7, 1929:21, 1939:11, 1946:2, 1974:1</p> <p>participants [2] - 1917:19, 1922:16</p> <p>participated [1] - 1923:10</p> <p>participation [1] - 1923:18</p> <p>particular [20] - 1908:23, 1910:12, 1910:19, 1911:12, 1911:13, 1913:18, 1914:5, 1914:7, 1916:16, 1918:23, 1919:10, 1924:19, 1927:11, 1936:24,</p>	

<p>1916:12</p> <p>persons [3] - 1921:23, 1929:22, 1939:25</p> <p>persuade [9] - 1872:3, 1920:17, 1921:8, 1928:15, 1928:21, 1929:25, 1930:14, 1930:21, 1975:11</p> <p>persuaded [1] - 1924:25</p> <p>persuades [1] - 1926:12</p> <p>persuasion [1] - 1919:23</p> <p>pertaining [2] - 1966:14, 1966:23</p> <p>pertains [1] - 1941:12</p> <p>phone [3] - 1904:22, 1958:1, 1965:7</p> <p>photograph [2] - 1966:13, 1966:20</p> <p>photographs [1] - 1966:20</p> <p>photos [1] - 1880:8</p> <p>phrase [4] - 1926:12, 1930:21, 1960:11</p> <p>phrases [3] - 1942:10, 1960:21, 1962:24</p> <p>physical [2] - 1926:9, 1942:20</p> <p>physically [4] - 1942:15, 1942:16, 1942:25, 1958:25</p> <p>picked [1] - 1889:5</p> <p>piece [2] - 1969:25, 1971:1</p> <p>place [6] - 1884:7, 1899:9, 1923:2, 1941:5, 1951:20</p> <p>plainest [1] - 1907:23</p> <p>plan [9] - 1895:16, 1895:18, 1895:19, 1895:21, 1899:2, 1899:9, 1899:10, 1901:18, 1922:7</p> <p>planet [1] - 1890:17</p> <p>planned [1] - 1929:12</p> <p>planning [1] - 1929:7</p> <p>plans [1] - 1901:13</p> <p>play [9] - 1881:9, 1882:14, 1885:25, 1897:5, 1897:7, 1923:21, 1923:22, 1924:15, 1946:15</p> <p>played [1] - 1887:4</p> <p>playing [3] - 1889:6, 1889:14</p> <p>Plaza [1] - 1870:22</p> <p>pleaded [1] - 1910:1</p> <p>plural [1] - 1878:3</p> <p>pm [6] - 1960:2, 1963:7, 1964:2, 1965:2, 1966:2, 1968:2</p> <p>pocket [1] - 1894:1</p> <p>point [11] - 1874:4, 1875:12, 1878:16, 1885:16, 1885:17, 1899:13, 1907:1, 1948:24, 1952:22, 1952:24, 1956:6</p> <p>pointed [1] - 1955:7</p> <p>points [3] - 1876:20, 1912:19, 1955:9</p> <p>police [1] - 1894:1</p> <p>polite [1] - 1871:20</p> <p>portion [2] - 1969:13, 1969:14</p> <p>portions [1] - 1972:18</p> <p>position [4] - 1907:20, 1949:3, 1955:3, 1955:11</p> <p>possessed [5] - 1908:2, 1941:14, 1941:19, 1943:9, 1943:12</p> <p>possessing [3] - 1904:23, 1920:8,</p>	<p>1942:25</p> <p>possession [14] - 1907:9, 1941:22, 1942:2, 1942:7, 1942:13, 1942:14, 1942:16, 1942:20, 1942:21, 1942:22, 1942:24, 1943:1, 1966:15</p> <p>possible [3] - 1911:9, 1916:23, 1917:23</p> <p>possibly [3] - 1887:8, 1889:19, 1901:7</p> <p>Post [6] - 1898:25, 1971:16, 1972:4, 1974:1, 1975:7</p> <p>Post-it [5] - 1898:25, 1971:16, 1972:4, 1974:1</p> <p>Post-its [1] - 1975:7</p> <p>postured [1] - 1949:8</p> <p>potential [7] - 1927:17, 1927:18, 1927:20, 1929:23, 1929:25, 1935:11, 1937:14</p> <p>pounds [1] - 1975:7</p> <p>pour [1] - 1891:15</p> <p>power [2] - 1899:23, 1942:17</p> <p>practice [2] - 1970:3, 1970:4</p> <p>precinct [1] - 1894:3</p> <p>precisely [2] - 1907:22, 1976:10</p> <p>prefer [3] - 1974:9, 1975:3, 1975:18</p> <p>preference [1] - 1950:12</p> <p>prejudice [1] - 1909:16</p> <p>preparation [2] - 1916:20, 1929:6</p> <p>prepare [1] - 1916:23</p> <p>preponderance [7] - 1936:21, 1937:5, 1937:11, 1937:12, 1937:17, 1937:19, 1952:3</p> <p>preposterous [2] - 1885:10, 1892:4</p> <p>prepping [1] - 1894:7</p> <p>presence [1] - 1877:8</p> <p>present [11] - 1873:8, 1878:1, 1907:16, 1917:4, 1923:2, 1953:1, 1954:5, 1958:25, 1961:23, 1962:6, 1975:14</p> <p>presentation [2] - 1889:3, 1889:13</p> <p>presented [4] - 1886:20, 1909:13, 1911:24, 1949:17</p> <p>preserve [1] - 1948:23</p> <p>pressure [1] - 1969:13</p> <p>presumed [1] - 1910:9</p> <p>presumes [1] - 1910:7</p> <p>presumption [2] - 1910:13, 1910:15</p> <p>pretrial [1] - 1954:10</p> <p>pretty [2] - 1886:2, 1972:1</p> <p>prevent [5] - 1919:24, 1921:9, 1925:2, 1928:17, 1930:17</p> <p>primarily [6] - 1940:22, 1941:1, 1941:6, 1941:23, 1942:4, 1942:10</p> <p>principle [1] - 1906:6</p> <p>prison [1] - 1920:10</p> <p>Prisons [2] - 1939:11, 1950:14</p> <p>private [1] - 1939:9</p> <p>problem [1] - 1964:4</p> <p>proceed [1] - 1943:22</p> <p>proceeding [2] - 1925:3, 1925:4</p> <p>Proceedings [1] - 1870:24</p>	<p>produce [3] - 1898:8, 1910:7, 1959:13</p> <p>produced [1] - 1870:25</p> <p>product [2] - 1919:6, 1919:7</p> <p>profession [1] - 1927:3</p> <p>promise [3] - 1895:23, 1938:22, 1953:9</p> <p>promised [1] - 1938:15</p> <p>promising [1] - 1938:22</p> <p>proof [15] - 1898:21, 1911:1, 1911:9, 1912:18, 1913:20, 1921:22, 1922:5, 1922:9, 1922:16, 1936:21, 1937:3, 1943:2, 1952:3</p> <p>properly [2] - 1912:15, 1916:24</p> <p>propose [1] - 1964:8</p> <p>proposed [1] - 1955:19</p> <p>proposition [1] - 1907:7</p> <p>prosecution [1] - 1917:7</p> <p>prosecution's [1] - 1917:5</p> <p>prosecutions [1] - 1916:1</p> <p>prosecutor [3] - 1897:19, 1897:20, 1900:9</p> <p>prospective [1] - 1936:15</p> <p>protectors [1] - 1880:5</p> <p>prove [30] - 1874:3, 1886:16, 1886:21, 1899:21, 1908:24, 1910:2, 1910:4, 1910:14, 1911:8, 1917:5, 1917:8, 1918:15, 1919:10, 1921:3, 1921:4, 1921:17, 1921:25, 1922:1, 1924:8, 1928:3, 1928:4, 1937:4, 1937:17, 1937:20, 1939:13, 1939:14, 1939:25, 1940:1, 1940:14, 1941:16</p> <p>proved [7] - 1910:11, 1912:7, 1922:20, 1924:23, 1937:6, 1938:12, 1943:2</p> <p>proven [5] - 1917:22, 1918:5, 1918:19, 1919:2, 1927:10</p> <p>proves [5] - 1899:6, 1899:8, 1901:12, 1937:9, 1937:12</p> <p>provide [1] - 1943:14</p> <p>provided [1] - 1944:19</p> <p>providing [1] - 1927:15</p> <p>proving [2] - 1937:18, 1938:2</p> <p>pull [1] - 1886:9</p> <p>pun [2] - 1948:13, 1948:14</p> <p>punishment [2] - 1917:24, 1918:7</p> <p>purpose [10] - 1922:17, 1923:8, 1923:16, 1926:13, 1927:1, 1941:2, 1941:6, 1941:7, 1942:5, 1949:10</p> <p>purposefully [1] - 1919:5</p> <p>purposes [4] - 1922:3, 1923:11, 1924:4, 1956:11</p> <p>pursuant [3] - 1939:10, 1949:18, 1964:6</p> <p>pursue [1] - 1885:3</p> <p>put [21] - 1871:11, 1874:2, 1879:16, 1882:8, 1885:18, 1890:15, 1890:21, 1894:17, 1897:1, 1901:6, 1959:3, 1959:10, 1959:15, 1966:6, 1966:10, 1968:12, 1968:16, 1969:9, 1972:4, 1973:25</p> <p>putting [3] - 1889:8, 1950:22, 1969:13</p>
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<p style="text-align: center;">Q</p> <p>quality [1] - 1902:22 quantity [2] - 1902:15, 1902:21 quarter [2] - 1965:8, 1970:5 quarterbacking [1] - 1885:4 questions [5] - 1877:18, 1877:19, 1886:8, 1912:9, 1959:17 quick [1] - 1948:10 quickly [1] - 1892:3</p>	<p>reasons [1] - 1917:21 rebuttal [4] - 1872:20, 1873:13, 1906:20, 1907:10 received [3] - 1912:5, 1915:20, 1946:12 recess [9] - 1958:19, 1959:21, 1959:23, 1963:25, 1965:14, 1967:9, 1972:12, 1972:13, 1976:16 recognizes [2] - 1912:14, 1942:13 record [18] - 1871:11, 1873:18, 1873:23, 1873:24, 1874:10, 1876:15, 1879:25, 1896:4, 1946:6, 1950:22, 1959:11, 1959:15, 1964:12, 1965:3, 1966:6, 1966:10, 1967:6, 1970:11 recorded [5] - 1870:24, 1954:2, 1957:25, 1958:1, 1958:4 recorder [2] - 1896:3 recording [1] - 1958:8 recordings [6] - 1900:7, 1902:23, 1904:8, 1904:9, 1943:13 records [3] - 1891:14, 1891:15, 1898:20 red [1] - 1904:17 redacted [2] - 1967:1, 1974:1 refer [1] - 1913:17 reference [5] - 1872:4, 1872:6, 1906:19, 1913:19, 1936:7 referred [1] - 1936:18 referring [1] - 1963:13 reflection [1] - 1888:24 reflects [1] - 1964:12 refuse [7] - 1920:22, 1931:1, 1931:19, 1932:10, 1932:25, 1933:18, 1934:14 regard [18] - 1872:2, 1911:24, 1914:11, 1924:16, 1927:25, 1931:17, 1932:6, 1936:4, 1936:8, 1937:8, 1938:20, 1942:13, 1952:2, 1952:5, 1952:8, 1952:11, 1957:18 regarding [1] - 1929:16 regards [3] - 1956:21, 1971:2, 1972:23 regular [1] - 1881:7 relate [2] - 1930:7, 1940:9 related [4] - 1872:10, 1877:9, 1879:4, 1879:19 relates [4] - 1906:22, 1930:10, 1936:23, 1938:9 relationship [1] - 1879:15 relationships [1] - 1929:17 relative [3] - 1879:6, 1879:16, 1879:22 relax [1] - 1893:6 relevant [7] - 1931:7, 1932:1, 1932:15, 1933:5, 1933:23, 1934:19, 1935:10 relied [1] - 1939:25 relieves [1] - 1938:1 reluctant [1] - 1883:18 rely [4] - 1889:17, 1911:3, 1913:12, 1949:5 relying [2] - 1872:2, 1945:9 remains [3] - 1917:7, 1937:1, 1963:23 remarks [1] - 1907:2</p>	<p>remember [17] - 1874:1, 1874:22, 1874:23, 1876:21, 1878:12, 1879:13, 1881:11, 1887:8, 1891:20, 1892:4, 1895:11, 1900:7, 1945:9, 1953:10, 1962:25, 1971:7, 1971:8 remind [5] - 1911:19, 1917:5, 1921:6, 1938:19, 1975:13 reminded [1] - 1906:21 reminder [1] - 1958:3 removed [2] - 1872:10, 1971:17 render [3] - 1909:15, 1919:16, 1945:14 rendered [4] - 1940:22, 1941:1, 1941:23, 1942:4 renew [1] - 1961:1 repeated [1] - 1945:22 report [1] - 1914:20 Reporter [1] - 1870:22 reporter [1] - 1965:5 reporting [3] - 1896:1, 1901:15, 1902:24 representation [5] - 1926:23, 1927:13, 1927:15, 1939:17, 1949:10 representative [1] - 1939:8 represented [4] - 1880:15, 1927:19, 1939:8, 1939:16 representing [1] - 1927:5 request [12] - 1872:9, 1872:13, 1903:25, 1949:4, 1955:24, 1956:8, 1958:7, 1960:6, 1963:9, 1964:6, 1968:7, 1971:1 requested [2] - 1906:22, 1949:2 requests [3] - 1904:7, 1946:5, 1946:7 require [2] - 1910:16, 1911:8 required [7] - 1917:8, 1917:9, 1919:9, 1923:9, 1923:10, 1939:25, 1949:18 requires [3] - 1907:17, 1913:13, 1913:21 reservation [2] - 1893:3, 1893:5 resolve [1] - 1937:24 resolved [2] - 1966:3, 1966:4 respect [16] - 1875:18, 1907:10, 1908:24, 1911:22, 1919:15, 1919:17, 1920:4, 1937:9, 1948:20, 1948:23, 1954:12, 1954:14, 1955:25, 1962:18, 1972:18, 1972:19 respects [1] - 1937:1 respond [1] - 1884:20 responded [1] - 1959:8 responds [1] - 1970:22 response [1] - 1884:20 responsibility [1] - 1916:24 responsible [1] - 1906:11 responsive [1] - 1946:6 rest [2] - 1900:23, 1928:1 restroom [2] - 1948:4, 1953:2 rests [1] - 1918:2 resume [1] - 1963:4 retain [1] - 1927:20 retire [2] - 1908:15, 1943:20</p>
<p style="text-align: center;">R</p> <p>rain [1] - 1913:6 raincoats [1] - 1912:24 raining [1] - 1913:3 raise [1] - 1952:19 raised [5] - 1876:23, 1879:13, 1895:18, 1937:25, 1954:10 rather [9] - 1901:22, 1906:4, 1908:15, 1912:5, 1919:6, 1921:22, 1929:1, 1956:22, 1969:7 reach [1] - 1944:5 reached [4] - 1946:16, 1946:17, 1946:24, 1946:25 reaching [2] - 1911:20, 1944:19 read [7] - 1875:5, 1877:14, 1879:9, 1887:7, 1946:10, 1969:16, 1972:22 readback [1] - 1946:8 readbacks [1] - 1946:5 reading [1] - 1969:7 ready [5] - 1873:5, 1873:12, 1959:7, 1966:4, 1969:3 real [1] - 1922:12 realized [1] - 1871:15 really [23] - 1876:9, 1877:20, 1878:20, 1878:22, 1881:15, 1883:10, 1885:7, 1885:24, 1893:10, 1895:19, 1895:21, 1896:9, 1900:5, 1900:7, 1900:10, 1901:8, 1902:14, 1903:3, 1955:9, 1960:20 rear [1] - 1912:24 reason [14] - 1884:6, 1884:16, 1896:7, 1899:16, 1910:21, 1940:25, 1942:3, 1942:8, 1943:5, 1945:16, 1949:14, 1955:20, 1957:12, 1960:7 reasonable [43] - 1910:3, 1910:5, 1910:12, 1910:14, 1910:18, 1910:20, 1910:22, 1910:24, 1911:1, 1911:2, 1911:4, 1911:5, 1911:6, 1911:9, 1911:13, 1911:17, 1913:8, 1913:15, 1916:15, 1917:6, 1917:23, 1918:5, 1918:16, 1918:19, 1921:4, 1921:18, 1922:21, 1924:8, 1924:23, 1926:10, 1927:2, 1927:10, 1928:4, 1937:3, 1937:7, 1937:19, 1938:4, 1938:12, 1939:14, 1940:1, 1940:14, 1941:17, 1943:2</p>		

<p>return [3] - 1944:14, 1953:13, 1963:4 review [1] - 1908:21 reviewing [1] - 1915:13 reworked [1] - 1871:25 ricco [1] - 1927:4 Ricco [2] - 1915:17, 1926:21 Ricco's [4] - 1968:7, 1969:8, 1971:8, 1974:25 ricco's [1] - 1970:23 ridiculous [1] - 1885:10 rise [2] - 1917:19, 1958:15 risk [3] - 1962:22, 1963:17, 1963:23 RK [1] - 1902:9 road [2] - 1884:20, 1899:19 rob [1] - 1881:20 robbed [1] - 1881:20 robber [1] - 1881:19 ROBERT [1] - 1870:5 Robert [18] - 1870:18, 1874:11, 1875:14, 1883:9, 1883:18, 1885:11, 1886:12, 1890:6, 1893:12, 1894:15, 1895:9, 1901:16, 1905:22, 1909:22, 1914:25, 1927:14, 1929:15 Rodney [3] - 1881:11, 1881:12, 1881:16 Roger [18] - 1874:14, 1875:6, 1875:22, 1877:11, 1880:12, 1884:14, 1892:13, 1899:5, 1899:14, 1901:17, 1919:22, 1920:15, 1927:16, 1928:11, 1929:18, 1938:17, 1943:16 role [6] - 1882:14, 1885:25, 1901:17, 1908:21, 1924:16, 1963:11 roles [2] - 1923:22 room [19] - 1887:10, 1891:9, 1919:18, 1944:14, 1945:24, 1946:9, 1946:13, 1951:16, 1952:23, 1953:11, 1953:13, 1955:9, 1955:10, 1955:18, 1959:7, 1960:19, 1962:13, 1963:4, 1975:23 rooms [1] - 1878:3 Rudolph [1] - 1870:22 rule [1] - 1882:1 Rule [4] - 1894:16, 1895:4, 1949:18, 1949:21 rules [2] - 1881:9, 1902:10 run [5] - 1895:15, 1897:2, 1897:19, 1962:22, 1972:3 running [3] - 1896:10, 1897:18, 1902:6 runs [1] - 1963:17 ruse [2] - 1895:14, 1939:4 rush [1] - 1948:6 Ryan [5] - 1920:19, 1932:20, 1932:25, 1936:4, 1936:5</p>	<p>saw [4] - 1875:21, 1901:22, 1912:23, 1957:12 scan [1] - 1876:7 scheme [3] - 1921:24, 1922:3, 1923:24 school [2] - 1887:9, 1962:23 scope [1] - 1923:25 screen [1] - 1894:17 screwing [2] - 1890:22, 1890:24 scrutinized [1] - 1916:4 seat [2] - 1873:11, 1961:21 seated [7] - 1871:3, 1954:17, 1958:21, 1961:24, 1964:3, 1968:3, 1972:15 second [20] - 1871:25, 1872:13, 1876:4, 1882:25, 1895:20, 1921:11, 1922:20, 1924:9, 1925:1, 1928:16, 1930:16, 1934:3, 1938:15, 1939:17, 1940:21, 1941:22, 1946:3, 1949:22, 1971:1, 1973:25 secrecy [1] - 1922:9 section [3] - 1963:12, 1972:19, 1973:6 sections [1] - 1973:24 see [22] - 1872:12, 1873:10, 1884:15, 1887:4, 1889:24, 1900:1, 1906:17, 1913:1, 1936:1, 1946:11, 1947:1, 1947:2, 1948:18, 1949:5, 1957:13, 1959:13, 1959:14, 1960:7, 1962:14, 1967:3, 1970:4, 1976:3 seek [2] - 1905:18, 1949:7 seeking [4] - 1883:14, 1936:19, 1937:10, 1964:13 seem [3] - 1913:8, 1914:14 seized [1] - 1933:7 selection [1] - 1915:6 self [1] - 1939:22 self-explanatory [1] - 1939:22 Selwyn [41] - 1874:4, 1874:6, 1874:8, 1874:16, 1874:19, 1875:9, 1876:1, 1876:16, 1876:19, 1876:20, 1882:11, 1883:12, 1884:6, 1884:22, 1884:25, 1885:2, 1885:13, 1888:12, 1889:25, 1890:14, 1893:6, 1893:20, 1894:12, 1895:1, 1895:13, 1896:5, 1896:8, 1896:10, 1901:7, 1901:13, 1905:6, 1915:22, 1920:17, 1921:21, 1928:10, 1928:15, 1929:3, 1929:16, 1932:2, 1954:3 send [40] - 1876:2, 1882:11, 1884:6, 1887:2, 1892:11, 1896:3, 1904:19, 1904:21, 1945:16, 1946:9, 1946:12, 1946:16, 1950:12, 1953:8, 1954:22, 1955:24, 1955:25, 1956:2, 1956:23, 1957:20, 1957:24, 1959:10, 1960:7, 1962:22, 1963:24, 1964:8, 1964:14, 1964:17, 1967:5, 1968:13, 1969:3, 1970:5, 1970:25, 1973:16, 1974:7, 1974:13, 1975:7, 1975:8, 1975:15 sending [5] - 1875:16, 1880:7, 1891:6, 1969:14 sends [1] - 1884:22 sense [9] - 1875:15, 1910:22, 1913:10,</p>	<p>1917:25, 1918:9, 1922:12, 1955:11, 1955:12, 1955:21 sent [22] - 1875:13, 1875:25, 1876:3, 1876:12, 1885:2, 1885:23, 1892:23, 1933:9, 1940:16, 1940:18, 1940:21, 1940:25, 1942:9, 1956:23, 1957:17, 1958:7, 1962:8, 1970:22, 1974:24 sentence [1] - 1918:2 sentences [1] - 1889:9 separate [6] - 1871:17, 1919:16, 1919:19, 1920:2, 1923:20, 1948:16 separately [4] - 1911:22, 1919:15, 1938:20, 1951:12 September [14] - 1897:11, 1899:1, 1899:2, 1920:14, 1928:10, 1930:5, 1930:12, 1931:16, 1932:5, 1933:14, 1934:10, 1934:25, 1938:14, 1940:11 service [1] - 1904:25 Service [1] - 1950:15 set [1] - 1873:24 seven [4] - 1881:17, 1928:23, 1934:11, 1952:8 Seven [3] - 1933:12, 1936:11, 1938:3 seventeen [1] - 1973:13 several [1] - 1912:23 shaking [1] - 1912:24 shall [1] - 1889:2 shame [1] - 1967:5 SHARGEL [58] - 1870:17, 1871:21, 1872:12, 1872:17, 1873:5, 1906:23, 1907:1, 1907:23, 1948:13, 1948:17, 1948:20, 1948:22, 1949:23, 1950:1, 1950:3, 1950:7, 1950:20, 1952:6, 1953:19, 1954:1, 1954:13, 1956:14, 1957:7, 1959:19, 1960:13, 1961:5, 1961:11, 1961:14, 1963:8, 1963:25, 1964:5, 1964:10, 1964:19, 1964:21, 1966:3, 1966:25, 1968:6, 1968:10, 1969:1, 1969:11, 1970:2, 1970:8, 1970:12, 1970:14, 1971:14, 1971:24, 1973:1, 1973:4, 1973:12, 1973:19, 1973:23, 1974:5, 1974:16, 1975:17, 1975:21, 1975:23, 1976:7, 1976:12 Shargel [16] - 1871:12, 1872:24, 1874:2, 1874:22, 1876:13, 1881:12, 1883:21, 1883:22, 1884:18, 1885:21, 1886:23, 1896:9, 1898:14, 1900:10, 1905:22, 1952:9 Shargel's [1] - 1936:7 sharing [1] - 1953:7 sheet [3] - 1919:19, 1948:15 sheets [5] - 1936:2, 1944:10, 1948:16, 1952:21, 1953:15 shifts [2] - 1910:5, 1917:8 shit [1] - 1883:13 Shoo [1] - 1896:3 show [5] - 1892:13, 1895:24, 1896:24, 1903:25, 1914:4 showed [2] - 1878:19, 1903:24 showing [1] - 1896:25</p>
S		
<p>safe [1] - 1942:20 Sancho [2] - 1920:19, 1932:21 satisfied [4] - 1910:11, 1911:16, 1913:14, 1916:15</p>		

<p>shows [1] - 1876:25</p> <p>shred [1] - 1898:4</p> <p>shut [1] - 1912:25</p> <p>shuttle [1] - 1905:12</p> <p>side [6] - 1948:1, 1952:9, 1954:4, 1961:2, 1971:17, 1973:23</p> <p>Side [3] - 1948:12, 1954:6, 1954:19</p> <p>sidebar [2] - 1906:17, 1947:1</p> <p>Sidebar [1] - 1906:18</p> <p>sidebars [2] - 1971:9, 1971:10</p> <p>sift [1] - 1946:6</p> <p>sight [2] - 1960:9, 1963:1</p> <p>signalled [1] - 1956:18</p> <p>signed [2] - 1945:17, 1946:17</p> <p>significance [1] - 1917:11</p> <p>signs [1] - 1884:20</p> <p>silent [1] - 1902:2</p> <p>SIMELS [1] - 1870:5</p> <p>Simels [66] - 1870:18, 1874:11, 1875:14, 1883:9, 1883:18, 1884:11, 1885:11, 1885:24, 1886:12, 1890:6, 1890:14, 1893:12, 1894:15, 1895:9, 1899:5, 1899:10, 1900:14, 1901:16, 1901:17, 1905:22, 1906:1, 1909:22, 1914:25, 1920:9, 1920:11, 1924:13, 1927:14, 1927:23, 1929:15, 1929:21, 1930:25, 1931:6, 1931:10, 1931:18, 1931:24, 1932:8, 1932:13, 1932:17, 1932:24, 1933:4, 1933:8, 1933:17, 1933:21, 1933:24, 1934:12, 1934:17, 1934:20, 1935:4, 1935:9, 1936:12, 1936:20, 1936:25, 1937:4, 1937:8, 1937:11, 1937:24, 1937:25, 1939:3, 1939:7, 1939:15, 1939:19, 1940:6, 1943:4, 1952:3, 1961:11, 1973:8</p> <p>Simels's [5] - 1882:21, 1889:13, 1971:2, 1971:22, 1972:23</p> <p>similarity [1] - 1913:22</p> <p>simple [1] - 1912:20</p> <p>simply [8] - 1892:14, 1907:11, 1924:2, 1945:1, 1945:23, 1946:12, 1956:19, 1973:12</p> <p>simultaneously [1] - 1953:4</p> <p>Singh [6] - 1920:20, 1934:24, 1935:5, 1935:9, 1935:11, 1936:12</p> <p>single [6] - 1886:6, 1893:16, 1893:17, 1899:11, 1908:14, 1962:16</p> <p>sit [2] - 1881:16, 1884:19</p> <p>sitting [1] - 1951:12</p> <p>Six [4] - 1932:19, 1936:3, 1936:10, 1938:3</p> <p>six [6] - 1883:23, 1933:16, 1952:8, 1963:20, 1975:3, 1977:13</p> <p>skullduggery [1] - 1887:15</p> <p>slightest [1] - 1962:22</p> <p>slot [1] - 1879:22</p> <p>Solano [13] - 1871:12, 1876:14, 1877:13, 1878:9, 1878:16, 1879:5, 1879:9, 1891:12, 1901:3, 1902:9, 1903:4, 1974:3, 1974:19</p>	<p>SOLANO [11] - 1870:19, 1948:18, 1948:21, 1955:3, 1956:5, 1959:20, 1961:7, 1968:24, 1974:4, 1974:20, 1974:22</p> <p>sole [6] - 1909:10, 1913:24, 1918:15, 1936:14, 1937:13, 1943:12</p> <p>solely [3] - 1911:23, 1918:5, 1936:13</p> <p>someone [11] - 1880:24, 1885:25, 1893:23, 1896:20, 1896:21, 1914:19, 1921:20, 1928:21, 1942:24, 1953:2, 1974:7</p> <p>sometimes [5] - 1892:1, 1895:6, 1951:7, 1959:12, 1974:13</p> <p>Son [2] - 1920:19, 1932:4</p> <p>sorry [5] - 1871:19, 1895:1, 1900:6, 1964:5, 1966:4</p> <p>sort [1] - 1880:3</p> <p>sound [2] - 1874:15, 1886:10</p> <p>sounded [1] - 1886:2</p> <p>sounds [2] - 1887:3, 1903:19</p> <p>source [1] - 1898:22</p> <p>sources [1] - 1929:22</p> <p>specialized [1] - 1915:19</p> <p>specific [2] - 1919:13, 1946:1</p> <p>specifically [1] - 1920:15</p> <p>specified [1] - 1952:15</p> <p>spectacular [1] - 1885:7</p> <p>speculate [1] - 1917:20</p> <p>speculation [1] - 1911:5</p> <p>spend [1] - 1882:24</p> <p>spends [1] - 1876:5</p> <p>spent [4] - 1882:20, 1882:21, 1882:23, 1883:21</p> <p>spin [1] - 1889:8</p> <p>spoken [2] - 1939:4, 1958:9</p> <p>spot [2] - 1886:15, 1902:4</p> <p>squeeze [1] - 1872:22</p> <p>stage [1] - 1976:8</p> <p>stand [10] - 1882:18, 1891:4, 1893:12, 1902:1, 1907:7, 1914:6, 1917:10, 1917:14, 1946:21, 1946:23</p> <p>standard [2] - 1927:2, 1937:20</p> <p>start [5] - 1875:9, 1884:25, 1890:10, 1895:17, 1956:11</p> <p>started [4] - 1874:22, 1874:25, 1885:12, 1888:19</p> <p>starting [2] - 1875:11, 1973:10</p> <p>starts [1] - 1973:2</p> <p>state [2] - 1908:12, 1926:25</p> <p>statement [11] - 1886:23, 1898:14, 1914:6, 1920:10, 1939:15, 1939:17, 1939:19, 1940:1, 1940:2, 1940:5, 1940:8</p> <p>statements [3] - 1912:8, 1912:9, 1922:15</p> <p>STATES [3] - 1870:1, 1870:3, 1870:10</p> <p>States [8] - 1870:13, 1894:19, 1895:2, 1939:11, 1939:21, 1940:5, 1941:5, 1941:6</p> <p>stating [2] - 1908:15, 1962:17</p>	<p>statute [5] - 1907:17, 1926:24, 1938:21, 1938:23, 1939:2</p> <p>statutory [2] - 1907:7, 1907:15</p> <p>stay [2] - 1970:6, 1974:11</p> <p>stenography [1] - 1870:24</p> <p>step [3] - 1929:5, 1929:11, 1951:24</p> <p>STEVEN [1] - 1870:14</p> <p>stick [1] - 1974:15</p> <p>still [4] - 1904:21, 1904:25, 1905:1, 1952:23</p> <p>sting [19] - 1886:14, 1888:17, 1895:9, 1895:10, 1895:11, 1895:14, 1896:15, 1897:5, 1897:9, 1898:2, 1898:4, 1898:5, 1898:7, 1899:2, 1899:13, 1899:17, 1899:22, 1900:4, 1900:6</p> <p>stinging [1] - 1900:9</p> <p>stipulated [1] - 1918:19</p> <p>stipulation [2] - 1918:17, 1918:18</p> <p>stipulations [1] - 1912:6</p> <p>stop [4] - 1885:21, 1901:22, 1944:15, 1953:3</p> <p>stopped [1] - 1894:2</p> <p>straight [2] - 1873:24, 1890:9</p> <p>street [2] - 1887:25, 1891:8</p> <p>stress [1] - 1923:2</p> <p>stricken [1] - 1912:11</p> <p>strike [2] - 1971:11, 1972:5</p> <p>strikes [1] - 1976:5</p> <p>string [1] - 1928:6</p> <p>strong [2] - 1960:8, 1963:3</p> <p>stronger [1] - 1893:1</p> <p>structure [1] - 1957:2</p> <p>stuff [6] - 1903:21, 1904:15, 1904:24, 1951:17, 1971:7, 1972:10</p> <p>stupid [3] - 1901:10, 1901:11, 1955:17</p> <p>subject [3] - 1874:18, 1927:4, 1943:6</p> <p>subjected [1] - 1915:1</p> <p>submit [5] - 1880:9, 1884:24, 1888:23, 1889:12, 1892:12</p> <p>submitted [1] - 1907:6</p> <p>suborn [1] - 1893:22</p> <p>suborning [1] - 1893:25</p> <p>subsequent [2] - 1872:4, 1872:5</p> <p>substantial [3] - 1913:21, 1929:5, 1929:11</p> <p>substitute [1] - 1951:8</p> <p>succeed [3] - 1921:14, 1922:24, 1924:5</p> <p>sufficient [4] - 1910:16, 1911:9, 1919:7, 1922:4</p> <p>sufficiently [2] - 1954:21</p> <p>suggest [4] - 1875:17, 1884:8, 1901:3, 1968:12</p> <p>suggested [3] - 1880:25, 1885:13, 1896:9</p> <p>suggesting [1] - 1969:12</p> <p>suggestion [2] - 1885:14, 1899:23</p> <p>suggestive [1] - 1969:12</p> <p>suggests [1] - 1884:5</p>
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<p>sum ^[1] - 1923:14 summation ^[8] - 1873:13, 1874:3, 1874:23, 1889:14, 1906:20, 1907:11, 1936:8, 1949:8 summations ^[2] - 1873:3, 1908:10 sunny ^[1] - 1912:22 support ^[1] - 1898:9 supposed ^[8] - 1876:16, 1877:4, 1880:14, 1880:23, 1881:1, 1881:2, 1881:3, 1886:5 suppressed ^[1] - 1906:20 surely ^[1] - 1968:15 surge ^[1] - 1880:5 Surinam ^[1] - 1877:8 surrender ^[1] - 1944:23 surreptitious ^[4] - 1941:8, 1942:11, 1943:7, 1943:11 surreptitiously ^[2] - 1940:22, 1941:24 surrounding ^[1] - 1919:3 suspect ^[1] - 1914:15 suspicion ^[1] - 1911:6 sustained ^[1] - 1912:10 sworn/affirmed ^[1] - 1952:20 sympathy ^[4] - 1903:5, 1903:6, 1909:16, 1911:7 system ^[1] - 1880:22</p>	<p>1946:15, 1954:15, 1954:23, 1956:1, 1958:5 task ^[2] - 1909:3, 1951:12 team ^[2] - 1880:17, 1897:10 techniques ^[3] - 1883:25, 1884:4, 1918:14 telephone ^[1] - 1941:11 ten ^[2] - 1896:21, 1973:13 Ten ^[2] - 1938:7 tendency ^[1] - 1926:10 tends ^[1] - 1914:4 tense ^[1] - 1907:16 terms ^[2] - 1890:20, 1901:10 terrible ^[1] - 1903:19 testified ^[4] - 1914:3, 1914:13, 1914:25, 1926:22 testify ^[28] - 1883:13, 1894:8, 1894:12, 1896:21, 1917:2, 1917:4, 1917:12, 1917:16, 1920:21, 1920:22, 1929:16, 1931:2, 1931:20, 1932:10, 1933:1, 1933:19, 1934:14, 1935:5, 1936:15, 1936:16, 1937:14, 1937:15 testifying ^[2] - 1893:15, 1902:14 testimony ^[66] - 1872:16, 1882:16, 1892:10, 1912:3, 1912:16, 1914:1, 1914:2, 1914:8, 1914:9, 1914:16, 1914:17, 1914:18, 1915:2, 1915:3, 1915:5, 1915:8, 1915:10, 1915:14, 1915:16, 1915:22, 1916:3, 1916:11, 1916:19, 1917:18, 1919:24, 1919:25, 1921:9, 1921:10, 1925:2, 1925:4, 1927:4, 1927:8, 1927:22, 1928:18, 1928:19, 1930:17, 1930:19, 1931:9, 1932:16, 1933:25, 1934:21, 1938:17, 1945:22, 1946:2, 1946:3, 1946:8, 1946:10, 1949:11, 1968:10, 1968:17, 1968:22, 1969:2, 1969:8, 1969:10, 1969:15, 1969:16, 1969:22, 1969:23, 1970:24, 1970:25, 1971:2, 1971:8, 1971:22, 1972:23, 1974:25 text ^[1] - 1900:19 text-messaging ^[1] - 1900:19 THE ^[133] - 1870:9, 1871:2, 1871:5, 1871:8, 1871:25, 1872:15, 1872:23, 1873:2, 1873:6, 1873:9, 1873:16, 1903:8, 1903:10, 1906:16, 1906:19, 1906:25, 1907:21, 1908:3, 1908:5, 1926:1, 1934:9, 1936:1, 1948:2, 1948:3, 1948:6, 1948:14, 1948:19, 1949:22, 1949:24, 1950:2, 1950:4, 1950:9, 1950:21, 1950:23, 1951:2, 1951:20, 1951:23, 1951:24, 1952:7, 1952:18, 1952:19, 1952:21, 1953:18, 1953:22, 1954:4, 1954:7, 1954:14, 1954:17, 1954:20, 1955:15, 1956:10, 1956:25, 1957:10, 1958:16, 1958:19, 1959:21, 1960:3, 1960:15, 1961:3, 1961:6, 1961:8, 1961:10, 1961:12, 1961:15, 1961:19, 1961:21, 1961:22, 1961:24, 1962:1, 1962:2, 1962:7,</p>	<p>1963:14, 1963:16, 1963:20, 1963:23, 1964:3, 1964:7, 1964:11, 1964:17, 1964:22, 1965:3, 1966:5, 1966:8, 1966:10, 1966:17, 1967:2, 1967:5, 1968:3, 1968:7, 1968:11, 1968:15, 1968:19, 1968:21, 1968:25, 1969:2, 1969:5, 1969:7, 1969:17, 1969:20, 1970:4, 1970:10, 1970:15, 1970:19, 1970:20, 1971:6, 1971:13, 1971:19, 1972:1, 1972:7, 1972:8, 1972:9, 1972:11, 1972:15, 1973:3, 1973:7, 1973:16, 1973:18, 1973:21, 1974:2, 1974:7, 1974:17, 1974:19, 1974:21, 1974:24, 1975:3, 1975:6, 1975:19, 1975:22, 1975:24, 1976:2, 1976:8, 1976:13, 1976:15 themselves ^[5] - 1905:19, 1910:21, 1929:10, 1954:20, 1956:1 theory ^[11] - 1920:21, 1927:24, 1928:3, 1931:2, 1931:20, 1932:11, 1933:1, 1933:19, 1934:12, 1934:15, 1935:6 therefore ^[3] - 1910:2, 1911:1, 1922:10 thinking ^[4] - 1879:19, 1879:23, 1883:23, 1885:22 thinks ^[5] - 1885:21, 1894:6, 1896:20, 1926:9, 1973:8 third ^[3] - 1888:2, 1939:18, 1942:2 Third ^[1] - 1940:24 Thirteen ^[4] - 1908:1, 1940:9, 1941:12, 1943:4 thoroughly ^[1] - 1916:23 thousand ^[6] - 1890:18, 1891:11, 1891:14, 1891:16, 1896:21 threat ^[3] - 1926:7, 1926:10, 1930:21 threaten ^[11] - 1882:8, 1882:17, 1892:20, 1921:7, 1926:5, 1929:24, 1930:14, 1932:2, 1932:18, 1933:10, 1934:22 threatened ^[3] - 1920:23, 1924:25, 1926:8 threatening ^[3] - 1881:4, 1883:16, 1891:5 threats ^[9] - 1872:7, 1919:23, 1926:4, 1931:5, 1931:23, 1932:12, 1933:3, 1934:16, 1935:8 three ^[14] - 1874:13, 1892:7, 1893:15, 1932:7, 1932:23, 1933:16, 1934:11, 1935:3, 1941:3, 1952:8, 1953:10, 1965:8, 1966:11, 1977:8 Three ^[6] - 1872:6, 1930:3, 1930:10, 1931:17, 1936:9, 1938:3 throughout ^[6] - 1910:10, 1917:1, 1917:7, 1930:22, 1930:23, 1946:19 timber ^[1] - 1877:5 timeline ^[1] - 1874:2 tinkered ^[1] - 1872:5 Title ^[1] - 1900:6 title ^[1] - 1888:9 together ^[7] - 1881:14, 1911:20,</p>
T		
<p>T-26 ^[1] - 1896:24 T-28 ^[1] - 1896:24 table ^[1] - 1940:10 tacitly ^[1] - 1922:5 tagged ^[1] - 1971:13 talks ^[2] - 1876:22, 1974:8 tamper ^[29] - 1881:13, 1881:15, 1881:17, 1882:22, 1919:22, 1920:12, 1920:14, 1928:7, 1928:10, 1929:3, 1930:3, 1930:6, 1931:12, 1932:3, 1932:19, 1933:12, 1934:4, 1934:23, 1935:1, 1936:5, 1936:8, 1936:9, 1936:10, 1936:11, 1936:12, 1938:6, 1952:12, 1952:13 tampered ^[1] - 1920:4 tampering ^[9] - 1920:2, 1924:13, 1924:15, 1924:22, 1926:16, 1926:24, 1927:7, 1928:24, 1949:4 tape ^[27] - 1886:9, 1886:24, 1886:25, 1888:20, 1889:14, 1895:12, 1895:15, 1896:5, 1897:6, 1899:5, 1899:7, 1899:10, 1899:14, 1899:15, 1899:18, 1899:24, 1900:3, 1902:21, 1906:20, 1954:12, 1956:7, 1956:11, 1956:12, 1958:1, 1958:4, 1958:9 tape-recorded ^[2] - 1958:1, 1958:4 tapes ^[21] - 1886:21, 1887:17, 1888:4, 1888:24, 1889:6, 1889:11, 1889:13, 1889:15, 1889:16, 1903:1, 1903:2, 1904:16, 1905:12, 1905:13, 1946:14,</p>		

<p>1921:23, 1922:17, 1931:4, 1959:3, 1965:9</p> <p>token [1] - 1923:6</p> <p>tomorrow [1] - 1976:4</p> <p>Tony [1] - 1969:8</p> <p>took [6] - 1871:17, 1888:18, 1893:12, 1953:20, 1956:17</p> <p>tool [1] - 1891:25</p> <p>topic [3] - 1876:23, 1891:10, 1898:18</p> <p>toss [1] - 1882:1</p> <p>total [1] - 1904:17</p> <p>touching [1] - 1942:23</p> <p>tough [1] - 1902:3</p> <p>toward [1] - 1949:16</p> <p>towards [3] - 1874:3, 1929:5, 1944:18</p> <p>traditionally [2] - 1943:21, 1943:23</p> <p>trafficking [5] - 1920:15, 1929:19, 1931:4, 1931:22, 1943:16</p> <p>TRANSCRIPT [1] - 1870:9</p> <p>transcript [12] - 1870:24, 1877:21, 1878:24, 1899:25, 1946:9, 1953:21, 1955:19, 1957:14, 1957:20, 1958:5, 1958:10, 1972:19</p> <p>transcripts [13] - 1889:7, 1889:18, 1954:20, 1954:22, 1955:4, 1955:13, 1955:14, 1955:21, 1956:3, 1956:17, 1956:22, 1957:25, 1958:6</p> <p>trash [2] - 1887:11, 1891:8</p> <p>treat [1] - 1956:25</p> <p>trial [39] - 1873:20, 1875:7, 1875:9, 1880:9, 1885:20, 1889:2, 1891:21, 1894:6, 1894:19, 1894:22, 1894:23, 1909:5, 1912:12, 1916:19, 1916:21, 1916:25, 1917:1, 1917:7, 1920:15, 1926:21, 1928:11, 1928:18, 1928:19, 1930:2, 1930:18, 1930:19, 1934:19, 1935:12, 1938:17, 1943:16, 1954:1, 1954:11, 1955:5, 1958:4, 1958:19, 1959:22, 1960:3, 1965:4</p> <p>TRIAL [1] - 1870:9</p> <p>trick [2] - 1879:10, 1938:25</p> <p>tricked [2] - 1903:21, 1905:10</p> <p>tried [3] - 1871:16, 1884:12, 1911:19</p> <p>trim [1] - 1872:20</p> <p>true [11] - 1874:10, 1887:2, 1890:12, 1893:22, 1895:7, 1923:4, 1933:8, 1937:2, 1937:21, 1945:14</p> <p>truly [1] - 1945:13</p> <p>trust [2] - 1896:10, 1906:10</p> <p>truth [18] - 1878:20, 1882:6, 1882:7, 1882:10, 1883:4, 1883:8, 1883:10, 1883:14, 1883:19, 1916:7, 1916:10, 1936:19, 1937:10, 1944:24, 1949:7, 1949:11, 1949:17, 1964:13</p> <p>truth-seeking [2] - 1936:19, 1937:10</p> <p>truthfully [2] - 1936:15, 1937:15</p> <p>try [5] - 1872:21, 1882:7, 1883:7, 1945:13, 1961:12</p> <p>trying [13] - 1874:3, 1878:11, 1879:10, 1880:21, 1888:1, 1895:12, 1896:16,</p>	<p>1899:22, 1904:1, 1904:10, 1914:20, 1938:25, 1953:9</p> <p>turn [9] - 1877:14, 1904:25, 1918:20, 1918:22, 1919:13, 1924:18, 1928:6, 1938:7, 1962:23</p> <p>turned [2] - 1871:19, 1887:22</p> <p>turning [2] - 1927:7, 1938:6</p> <p>turns [1] - 1877:6</p> <p>twelve [5] - 1951:8, 1952:25, 1953:3, 1963:9, 1963:17</p> <p>Twelve [4] - 1907:25, 1940:9, 1940:10, 1943:4</p> <p>twice [1] - 1893:15</p> <p>twisted [1] - 1887:23</p> <p>two [40] - 1871:23, 1874:7, 1875:16, 1885:20, 1887:7, 1893:4, 1894:11, 1899:3, 1899:9, 1904:6, 1905:17, 1906:8, 1912:14, 1920:25, 1921:4, 1921:5, 1921:15, 1921:18, 1921:22, 1924:22, 1926:17, 1928:7, 1928:13, 1930:12, 1938:13, 1942:13, 1943:5, 1945:25, 1948:2, 1948:11, 1951:3, 1951:18, 1952:14, 1958:20, 1958:22, 1965:4, 1970:21, 1971:10, 1974:25, 1977:7</p> <p>Two [6] - 1872:2, 1872:4, 1924:18, 1928:9, 1929:2, 1929:15</p> <p>two-and-a-half [1] - 1887:7</p> <p>two-year-old [1] - 1875:16</p> <p>types [2] - 1912:14, 1942:14</p>	<p>unpleasant [1] - 1911:7</p> <p>unsigned [1] - 1875:4</p> <p>unwilling [1] - 1894:25</p> <p>unworthy [2] - 1914:9, 1935:7</p> <p>up [23] - 1871:15, 1871:17, 1877:8, 1880:18, 1881:11, 1884:8, 1884:19, 1887:15, 1889:5, 1894:6, 1895:24, 1897:20, 1900:4, 1901:18, 1903:10, 1903:12, 1905:11, 1905:12, 1948:24, 1951:16, 1954:4, 1954:8, 1972:10</p> <p>upstairs [1] - 1961:17</p> <p>useful [7] - 1940:22, 1941:2, 1941:6, 1941:23, 1942:4, 1942:11, 1954:21</p> <p>utilize [1] - 1943:13</p>
V		
	U	
	<p>U.S [3] - 1870:4, 1870:15, 1897:18</p> <p>umbrellas [1] - 1912:25</p> <p>unanimous [1] - 1944:9</p> <p>unanimously [1] - 1910:17</p> <p>under [7] - 1914:3, 1917:3, 1918:6, 1918:13, 1923:9, 1950:14, 1955:2</p> <p>undercover [3] - 1885:23, 1886:5, 1921:21</p> <p>underlying [1] - 1921:1</p> <p>undertaking [1] - 1923:17</p> <p>underway [2] - 1923:3, 1923:7</p> <p>uneasy [1] - 1902:3</p> <p>unfavorable [2] - 1892:16, 1916:21</p> <p>unfortunate [1] - 1887:13</p> <p>UNITED [3] - 1870:1, 1870:3, 1870:10</p> <p>United [8] - 1870:13, 1894:18, 1895:2, 1939:10, 1939:21, 1940:5, 1941:5</p> <p>unlawful [7] - 1921:19, 1922:6, 1922:17, 1923:13, 1923:15, 1924:6, 1934:1</p> <p>unless [5] - 1910:17, 1974:7, 1975:11, 1975:14, 1976:3</p> <p>unlike [1] - 1881:16</p> <p>unlikely [2] - 1953:11, 1962:3</p> <p>uno [1] - 1872:15</p> <p>unobjected [1] - 1907:22</p>	<p>valuables [1] - 1942:19</p> <p>Vaughn [69] - 1874:4, 1874:6, 1874:8, 1874:16, 1874:19, 1875:9, 1876:1, 1876:17, 1876:20, 1876:21, 1877:7, 1878:7, 1878:12, 1878:13, 1878:16, 1879:5, 1879:6, 1879:10, 1879:13, 1879:15, 1879:18, 1882:11, 1883:12, 1884:7, 1884:22, 1884:25, 1885:2, 1885:13, 1886:25, 1888:1, 1888:12, 1889:25, 1890:14, 1893:20, 1894:12, 1895:1, 1895:13, 1896:6, 1896:8, 1896:10, 1901:7, 1901:13, 1905:6, 1915:22, 1920:17, 1921:22, 1921:23, 1928:11, 1928:15, 1928:18, 1928:19, 1929:3, 1929:16, 1929:22, 1929:24, 1930:1, 1931:1, 1931:19, 1932:2, 1932:9, 1932:18, 1933:18, 1934:13, 1934:22, 1935:5, 1939:4, 1954:3, 1958:1</p> <p>vault [1] - 1942:21</p> <p>verdict [12] - 1909:16, 1911:21, 1919:18, 1919:19, 1936:1, 1944:10, 1946:24, 1948:15, 1948:16, 1952:21, 1953:15, 1964:23</p> <p>verdicts [16] - 1908:8, 1911:20, 1912:1, 1918:9, 1918:13, 1919:16, 1944:8, 1944:11, 1944:12, 1944:19, 1945:14, 1946:16, 1946:18, 1946:19, 1946:25</p> <p>vernacular [2] - 1888:8, 1890:3</p> <p>version [3] - 1872:13, 1949:6, 1949:21</p> <p>versions [1] - 1949:20</p> <p>victims [10] - 1905:5, 1905:6, 1905:7, 1905:8, 1905:9, 1905:11, 1905:13, 1905:14, 1905:16, 1905:18</p> <p>video [2] - 1874:2, 1894:19</p> <p>videotape [1] - 1894:23</p> <p>view [3] - 1908:8, 1944:18, 1972:20</p> <p>viewed [1] - 1916:4</p> <p>views [3] - 1944:1, 1944:3, 1945:5</p> <p>Vijai [2] - 1920:18, 1932:3</p> <p>Vijay [1] - 1932:9</p>

<p>violate ^[3] - 1920:25, 1926:24, 1939:2</p> <p>violating ^[1] - 1944:20</p> <p>violation ^[1] - 1938:23</p> <p>violations ^[1] - 1909:24</p> <p>violence ^[9] - 1882:17, 1893:10, 1920:23, 1931:5, 1931:23, 1932:12, 1933:3, 1934:16, 1935:8</p> <p>violent ^[1] - 1891:1</p> <p>visa ^[2] - 1879:14</p> <p>visas ^[1] - 1894:24</p> <p>visit ^[1] - 1920:11</p> <p>visitor ^[1] - 1879:13</p> <p>voice ^[1] - 1874:8</p> <p>voluntarily ^[1] - 1918:25</p> <p>vote ^[3] - 1911:17, 1944:1, 1944:3</p> <p>vouchers ^[3] - 1966:11, 1966:12, 1966:18</p>	<p>wiretap ^[5] - 1904:15, 1904:16, 1905:10, 1906:19, 1906:20</p> <p>wiretaps ^[1] - 1903:11</p> <p>wish ^[2] - 1914:15, 1943:25</p> <p>withhold ^[5] - 1919:25, 1921:10, 1925:4, 1928:19, 1930:18</p> <p>witness ^[59] - 1879:2, 1881:14, 1884:13, 1885:12, 1888:12, 1893:20, 1894:10, 1894:21, 1896:16, 1897:1, 1902:13, 1906:1, 1910:7, 1914:3, 1914:5, 1914:6, 1914:12, 1914:13, 1914:14, 1914:18, 1914:19, 1914:22, 1914:23, 1914:24, 1915:1, 1915:3, 1915:7, 1915:10, 1915:12, 1915:15, 1915:16, 1916:8, 1917:10, 1917:14, 1920:2, 1920:3, 1924:13, 1924:15, 1924:22, 1926:15, 1926:24, 1927:7, 1927:17, 1927:18, 1928:7, 1928:23, 1929:25, 1930:1, 1930:4, 1931:13, 1932:20, 1934:4, 1935:11, 1937:14, 1938:8, 1949:16</p> <p>witness' ^[1] - 1927:22</p> <p>witness's ^[6] - 1914:9, 1914:16, 1914:17, 1915:8, 1946:2, 1946:3</p> <p>witnesses ^[29] - 1880:19, 1881:4, 1882:4, 1882:12, 1882:22, 1885:13, 1891:7, 1892:24, 1895:16, 1896:15, 1901:14, 1909:8, 1912:3, 1913:25, 1915:6, 1915:17, 1916:20, 1916:25, 1919:22, 1919:25, 1920:13, 1920:14, 1927:20, 1929:23, 1936:9, 1936:15, 1938:7, 1952:13</p> <p>witnesses' ^[1] - 1914:1</p> <p>witnessing ^[1] - 1902:1</p> <p>woman ^[1] - 1896:17</p> <p>wonder ^[1] - 1891:12</p> <p>word ^[5] - 1873:19, 1900:1, 1903:11, 1905:7</p> <p>words ^[18] - 1882:12, 1883:23, 1886:23, 1886:24, 1887:6, 1889:8, 1892:2, 1894:11, 1905:16, 1907:12, 1910:20, 1922:2, 1922:13, 1926:5, 1930:20, 1939:4, 1958:9</p> <p>works ^[2] - 1899:3, 1907:14</p> <p>world ^[3] - 1888:2, 1893:1, 1900:5</p> <p>worst ^[1] - 1890:5</p> <p>worthy ^[1] - 1914:5</p> <p>wrap ^[1] - 1903:10</p> <p>write ^[4] - 1879:22, 1899:4, 1957:16, 1968:12</p> <p>writes ^[1] - 1899:4</p> <p>writing ^[8] - 1874:12, 1876:5, 1876:11, 1902:11, 1902:15, 1922:2, 1945:19, 1950:13</p> <p>written ^[3] - 1875:6, 1934:7, 1962:15</p> <p>wrongful ^[2] - 1907:15, 1926:13</p> <p>wrote ^[2] - 1878:21, 1900:8</p>	<p>Y</p> <p>year ^[1] - 1875:16</p> <p>years ^[1] - 1880:15</p> <p>yellow ^[2] - 1877:15, 1958:16</p> <p>yesterday ^[6] - 1872:9, 1873:25, 1874:2, 1880:7, 1881:12, 1894:17</p> <p>yesterday's ^[1] - 1872:13</p> <p>YORK ^[1] - 1870:1</p> <p>York ^[2] - 1870:5, 1870:23</p> <p>yourself ^[3] - 1897:22, 1898:2, 1901:1</p> <p>yourselves ^[2] - 1916:6, 1944:25</p>
<p>W</p>		
<p>wait ^[3] - 1902:10, 1961:15, 1974:5</p> <p>Waite ^[1] - 1920:10</p> <p>Waite's ^[1] - 1905:8</p> <p>waiting ^[2] - 1888:18, 1907:2</p> <p>walk ^[1] - 1957:12</p> <p>walked ^[2] - 1897:16, 1957:14</p> <p>walking ^[1] - 1900:20</p> <p>walks ^[1] - 1897:9</p> <p>wants ^[5] - 1876:22, 1883:13, 1899:5, 1899:17, 1902:10</p> <p>waste ^[1] - 1894:7</p> <p>wasted ^[1] - 1876:11</p> <p>ways ^[2] - 1883:7, 1901:16</p> <p>weapon ^[2] - 1882:12, 1891:6</p> <p>wearing ^[1] - 1912:24</p> <p>weather ^[1] - 1913:5</p> <p>week ^[1] - 1899:11</p> <p>weekend ^[1] - 1872:14</p> <p>weeks ^[4] - 1874:5, 1874:7, 1887:7, 1906:9</p> <p>weigh ^[1] - 1918:3</p> <p>weighing ^[1] - 1910:23</p> <p>weight ^[10] - 1909:9, 1914:1, 1915:9, 1915:15, 1915:21, 1916:5, 1937:22, 1944:2, 1944:3, 1944:24</p> <p>wet ^[2] - 1912:24, 1912:25</p> <p>whereas ^[1] - 1943:1</p> <p>whim ^[1] - 1911:5</p> <p>whole ^[15] - 1874:23, 1894:16, 1899:9, 1899:13, 1899:15, 1899:16, 1908:17, 1914:7, 1949:10, 1960:10, 1960:17, 1962:16, 1963:2, 1973:16</p> <p>willing ^[2] - 1881:16, 1954:25</p> <p>win ^[2] - 1891:25, 1905:21</p> <p>winding ^[1] - 1903:12</p> <p>window ^[1] - 1913:1</p> <p>Wire ^[1] - 1941:10</p> <p>wire ^[4] - 1886:25, 1940:23, 1941:24, 1943:8</p>		